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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~601~~ 2414.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEVERE, BY HIS NEXT FRIEND, WILLIAM B. SEVERE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 26, 1905.

(19,731.)

(19,731.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 631.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEVERE, BY HIS NEXT FRIEND, WILLIAM B. SEVERE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page.
Caption	1
Transcript from the supreme court of the District of Columbia	1
Caption	1
Declaration	3
Plea	3
Joinder of issue	4
Amendment to declaration	5
Verdict	6
Term prolonged	6
Stipulation as to signing bill of exceptions	7
Judgment, appeal, penalty of bond fixed, and time to file record extended	7
Memorandum: Appeal bond filed	8
Stipulation as to bill of exceptions	8
Bill of exceptions submitted to court	

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Page
Bill of exceptions made part of record ... 9
Bill of exceptions ... 9
Testimony of Eddie Severe ... 9
John E. Burch ... 12
William B. Severe ... 13
Mrs. Kate E. Severe ... 15
Charles E. Severe ... 16
James Severe ... 17
George M. Walker ... 18
Ernest F. Hawkins ... 19
Report of accident ... 21
Motorman's statement of accident ... 22
Testimony of John Greensmith ... 22
Maurice E. Spalling ... 23
A. S. Bryant ... 24
Thomas W. Phelps ... 24
Harry T. Knight ... 25
James B. Lackey ... 25
Exhibit J. B. L. No. 1—Order of county commissioners of Prince George county ... 28
Agreement between Riverdale Park Company, S. R. Bond, and the Maryland Traction Company ... 28
Testimony of Fred J. Mersheimer ... 29
W. H. H. Allen ... 30
Harry W. Fuller ... 31
George W. De Rene ... 32
Ernest F. Hawkins (recalled) ... 33
Fred J. Mersheimer (recalled) ... 33
William B. Severe (recalled) ... 34
Mrs. Kate E. Severe (recalled) ... 36
Charles E. Severe (recalled) ... 36
Eddie Severe (recalled) ... 36
Wm. Meyer Lewin ... 37
Fred J. Mersheimer (recalled) ... 37
Plaintiff's prayers ... 38
Defendant's prayers ... 39
Court's charge to jury ... 41
Præcipe for transcript ... 47
Clerk's certificate ... 48
Minute entries of argument, &c ... 49
Opinion ... 49
Judgment ... 58
Order allowing writ of error ... 58
Writ of error ... 59
Bond on writ of error ... 59
Citation and service ... 60
Clerk's certificate ... 61

In the Court of Appeals of the District of Columbia.

ALLAN L. McDERMOTT, Receiver, &c., Appellant,
vs.
CHARLES E. SEVERE, by Next Friend.
No. 1464.

a Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
No. 45838. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration, &c.*

Filed December 18, 1902.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
At Law. No. 45838.

The plaintiff, a minor, by his next friend, his father, William B. Severe, sues the defendant, Allan L. McDermott, as receiver of the City and Suburban Railway of Washington, a corporation,

I.

For that whereas heretofore, to wit, on the 31st day of August, 1902, the defendant, as receiver as aforesaid, by appointment of the

supreme court of the District of Columbia, affirmed by the circuit court of the United States for the District of Maryland, and as a common carrier was in possession of and was controlling, a certain line of railway partly in the District of Columbia and partly in the State of Maryland, upon which said line of railway the defendant, as receiver as aforesaid, on, and prior to, said day was engaged in the transportation of passengers by means of cars propelled by electricity, and for that on said date, to wit, on the 31st day of August,
2 1902, the plaintiff was lawfully upon a certain public crossing on and over said line or railway, at or near a certain station on said line of railway, in the State of Maryland, known as Riverdale, over and upon which said crossing persons were accustomed to pass and repass on foot as well as in vehicles, and while plaintiff was so lawfully on said crossing, the defendant, through his agents and employés, in charge of a certain car going at a high rate of speed toward the city of Washington, District of Columbia, so negligently and carelessly operated said car, that the plaintiff, while lawfully upon said crossing, as aforesaid, and exercising due care and caution on his part, was run into and struck by said car, and thereby and by reason of the negligence and carelessness of the defendant aforesaid, through his agents in charge of said car as aforesaid, the plaintiff was injured in and about his left foot and leg so that it became necessary thereafter to have said leg amputated at or about the knee, whereby the plaintiff was caused great pain and suffering and was seriously and permanently injured in and about his said leg, and suffered and still suffers and will continue to suffer great pain and agony, all to the damage of the plaintiff in the sum of $25,000.00 wherefor- he brings this suit.

And the plaintiff claims the sum of $25,000.00 besides costs of suit.

A. S. WORTHINGTON,
WM. M. LEWIN,
Attorneys for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth
3 day, exclusive of Sundays and legal holidays, occurring after the day of service hereof, otherwise judgment.

A. S. WORTHINGTON,
WM. M. LEWIN,
Attorneys for Plaintiff.

Plea.

Filed January 16, 1903.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
} At Law. No. 45838.

The defendant, for plea to the plaintiff's declaration in the above entitled cause, says he is not guilty as alleged.

J. J. DARLINGTON,
Attorney for Defendant.

4 *Joinder of Issue, &c.*

Filed January 20, 1903.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
} No. 45838. Law.

The plaintiff joins issue upon the defendant's plea to the plaintiff's declaration.

A. S. WORTHINGTON,
WM. MEYER LEWIN,
Attorneys for Plaintiff.

To J. J. Darlington, Esq., attorney for defendant:

Please take notice that the issues joined in this cause will be tried at the next term of this court.

A. S. WORTHINGTON,
WM. MEYER LEWIN,
Attorneys for Plaintiff.

5 *Amendment to Declaration.*

Filed March 1, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff, *vs.* ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.	At Law. No. 15838.

By leave of the court first had and obtained the plaintiff amends his declaration in this case by adding thereto the following count:—

II.

For that whereas heretofore, to wit, on the 31st day of August, 1902, and for a long time, to wit, six months prior thereto, the defendant as receiver as aforesaid by appointment of the supreme court of the District of Columbia, affirmed by the circuit court of the United States for the district of Maryland, and as a common carrier, was in possession of, and was controlling, a certain line of railway, partly in the District of Columbia, and partly in the State of Maryland, upon which said line of railway the defendant, as receiver as aforesaid, on said day and during said period was engaged in the transportation of passengers by means of certain cars propelled by electricity; and for that on said day and during said period
6 there was at or near a certain station known as Riverdale on said line of railway in the State of Maryland, a certain public crossing which said crossing then and there consisted in part of boards or planks placed on, over and across said track, and that it then and there became and was the duty of the defendant to maintain said crossing in a safe and skillful manner, yet the defendant on said day and during said prior period neglected its said duty in that regard, in this, that it so maintained said crossing that there was a space between said boards and one of said rails of the defendant's said track of such dimensions that a person passing over or otherwise lawfully upon said crossing was liable to have his foot caught in said space, so as to make it difficult to speedily withdraw his foot from the same, and for that on said day, to wit, the 31st day of August, 1902, the plaintiff while lawfully upon said crossing and while in the exercise of due and proper care on his part had his left foot caught in said space, so that he could not withdraw it therefrom, and while the plaintiff was using every reasonable effort to extract his foot therefrom, the defendant, through his agents and employés in charge of

a certain car passing over the defendant's said tracks toward the city of Washington, so negligently and carelessly operated said car by failing to keep a proper lookout, and by failing to keep said car under proper control when approaching said crossing; and by failing to promptly stop said car when the plaintiff's said situation was observed by the persons in charge of said car, and by running said car at said time at an excessive, dangerous and unlawful rate
7 of speed, and otherwise, that by reason of such negligence the plaintiff was run into and struck by said car and thereby and by reason of all of said negligence and carelessness of the defendant in the maintenance of said crossing and in the operation of said car as aforesaid, the plaintiff was injured in and about his left foot and leg, so that it became necessary thereafter to have said leg amputated at or about the knee, whereby the plaintiff was caused and will hereafter be caused great pain and suffering, and whereby also the plaintiff so long as he lives will be put to great inconvenience and distress, and will be prevented from entering upon any gainful occupation suited to his abilities, all to the damage of the plaintiff in the sum of twenty-five thousand dollars, wherefore he brings his suit.

And the plaintiff claims the sum of twenty-five thousand dollars, besides costs of suit.

A. S. WORTHINGTON,
Attorney for Plaintiff.

Endorsed.

Leave is hereby granted to file the within amendment to the declaration.

JOB BARNARD, *Justice.*

8 Supreme Court of the District of Columbia.

THURSDAY, *March* 31, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
At Law. No. 45838.

Come here again the parties aforesaid, in manner aforesaid and the same jury respited yesterday who, after the case is given them in charge, upon their oath say they find said issues in favor of the

plaintiff, and assess his damages, by reason of the premises, at fifteen thousand dollars ($15,000.00)

And, in answer to the interrogatories submitted to them for their consideration, they answer as follows:

1. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing? they answer Yes.

2. Was the defendant guilty of negligence in the improper management of the car? they answer Yes.

3. Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank? they say they cannot agree upon an answer thereto; thereupon counsel for the plaintiff consent that the jury
9 may answer said third interrogatory in the affirmative, but said jury was discharged from further considering said interrogatory.

* * * * * * *

MONDAY, *April* 4, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

CHARLES E. SEVERE, &c., *v.* ALLAN L. MCDERMOTT, Receiver. } At Law. No. 45838.

* * * * * * *

It is ordered that the January term, 1904, be, and hereby is, prolonged for the period of thirty-eight days for the purpose of settling bills of exception in the above-entitled cause.

Stipulation of Counsel, &c.

Filed May 6, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff, *vs.* ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railroad Company of Washington, a Corporation, Defendant. } At Law. No. 45838.

10 It being inconvenient for the counsel in the above entitled cause to dispose of the pending motion for a new trial therein and as the time fixed by the rules of court, within which a bill of

exceptions should be signed, will expire on the 18th instant, it is hereby agreed by and between the counsel for the respective parties that if the motion for a new trial shall be overruled that the judge who presided at the trial may sign a proper bill of exceptions in said cause at any time prior to the 10th day of July next. Dated this 5th day of May, 1904.

A. S. WORTHINGTON,
Attorney for Plaintiff.

C. C. COLE,
Attorney for Defendant.

Supreme Court of the District of Columbia.

TUESDAY, *June* 14, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLEN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant. } At Law. No. 45838.

11 Upon consideration of the motion of the defendant for a new trial heretofore submitted to the court, the same is hereby overruled, and judgment on verdict ordered: Therefore, it is considered that the plaintiff recover against the said Allan L. McDermott as receiver aforesaid the sum of fifteen thousand dollars ($15,000), with interest thereon from this date together with the costs of suit to be taxed by the clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals, and the bond for costs is fixed in the penalty of two hundred and fifty dollars.

Upon motion of the defendant, the time within which to file the transcript of record in the appellate court be, and hereby is, extended until the 1st day of September, 1904.

Memorandum.

June 27, 1904.—Appeal bond filed.

12 *Stipulation of Counsel.*

Filed June 30, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe,
vs.
ALLEN L. McDERMOTT, Receiver of the City and Suburban Railroad Company of Washington, a Corporation. } At Law. No. 45838.

It is hereby agreed by and between the parties to this suit, by their respective attorneys, that the bill of exceptions in this cause as agreed upon by said attorneys shall be filed in the clerk's office, and an order entered in the minute book of the filing thereof, and that the same has been taken under advisement by the court, and as the judge who presided at the trial is now out of the jurisdiction and will not return until about the first of August that he may sign said bill of exceptions after his return to the jurisdiction any time prior to the 6th day of August, 1904.

June 30th, 1904.

C. C. COLE,
B. W. PARKER,
For Defendant.
A. S. WORTHINGTON,
Of Counsel for Plaintiff.

13 Supreme Court of the District of Columbia.

SATURDAY, *July 9th*, 1904.

Session resumed pursuant to adjournment, Mr. Justice Gould, presiding.

This cause was tried by Justice Barnard.

CHARLES E. SEVERE, &c., Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver, Defendant. } At Law. No. 45838.

The bill of exceptions herein having been presented to the court, pursuant to the stipulation of counsel filed June 30th, 1904, providing for the filing and submission of said bill, the same is hereby taken under consideration.

* * * * * * *

Supreme Court of the District of Columbia.

MONDAY, *August 1st*, 1904.

Session resumed pursuant to adjournment, Hon. Job Barnard, justice, presiding.

* * * * * * *

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Surburban Railway of Washington, a Corporation, Defendant.
No. 45838. At Law.

14 Comes now the defendant by his attorneys and having heretofore presented the bill of exceptions taken at the trial of this cause, pray: that the same be signed and made of record now for then, which is accordingly done.

15 *Bill of Exceptions.*

Filed August 1, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
At Law. No. 45838.

Bill of exceptions.

Be it remembered that at the trial of this cause the plaintiff to maintain the issue on his part joined offered the testimony of the following witnesses, who, having been first duly sworn, testified in substance as follows:

EDDIE SEVERE, son of William B. Severe, ten years old lives at Riverdale; remembers the day Erickson was hurt; that at the time the accident happened he was up at the house and Raymond came up and told him about it; that he ran down and the car was coming then and they saw it was too late, so when the car came down he waved his hat and tried to stop it; that he did not get down to the station, but near it; that the car was coming from Riverdale; that when he first saw the car he got within ten feet of the track; that

when he got there and saw the car was coming he waved his hat and hollered for them to stop; that when he did this the car was about as far as over to that corner (indicating)—(this distance was measured and is forty-six feet six inches); that the
16 motorman didn't start to stop until it got down near Erickson; that he did not see what the motorman did when he waved his hat; that while he (the witness) was doing this (waving his hat) Erickson was right at the track with his foot caught; that there is a platform—just a board platform—on both sides of the road; that there is a crossing there that goes across the trolley car track; that it doesn't go across the railroad; that the crossing is made of boards; that his brother's foot was caught in about the middle or near the middle; that the track was going like that, and there was another board in there and he had his foot there and when the car was coming he bent over like this and the car ran right across him; that the car stopped, after it struck him, past the crossing; that the car dragged his brother a good ways from the crossing about as far as from here down to that little rail (indicating), a little ways down from the power house; that when he ran down and waved his hat he didn't pay any attention to what Raymond did; that there were only the three boys there when his brother had his foot caught; that his parents were on that day in Cape May; that it was on a Sunday; that his grandfather was at the house; that the colored girl went away just before the three boys left the house; that she had gone off on the cars a pretty long time before the accident happened; that they did not go down to the station with her, but were down there a little before her, and she came down after they were there; that he went back to get a drink of water; that it was not very long after that that Raymond came running up
17 there for him about a few minutes when Raymond came running up; that he was just going out of the yard by the gate; that Raymond did not come clear up to the house, just as far as the gate; that Raymond told him that Erickson's foot was caught down at the track, and he ran down there and at the time he got there the car was coming; that he did not go all the way up to his brother after the car had struck him; that his brother's foot was caught between the rail and the boards of the crossing.

On cross examination he testified:

That the accident occurred in the summer about two o'clock; that just three boys went down to the station first about one thirty o'clock and that no one else was with them; that they stayed down there about an hour or something like that; that they were first over by the power house, sitting down on a step waiting, and after a while they went over to the track; that they did not stay on the track very long; that after they were on the track he went up to the power house; that he went on the platform with his brothers; that he left his brothers on the platform, when he went up to get a drink of water; that he went up to the house to get a drink of water with the intention of coming back to wait for his mother; that he

went within about ten feet of his brother; that he did not step on either of the tracks, but on the two boards over a little ditch there; that there was a little ditch before you came to the railroad; that that was about as near as he went to his brother while he had his foot caught in the platform; that his foot was caught in the rail on the right side as you face Washington; that when he
18 got in that position, as he walked on the board across the ditch, the car was about as far from him as it is to that other side there (indicating) 50 or 60 feet; that when he got there and walked on those boards he waved his hat and was hollering for them to stop; that he did not notice what the motorman was doing at the time he waved his hat; that he continued to stand on the boards over the ditch until the car struck his brother; that he stood about the same distance from the tracks; that there is a house that is used by the railroad company as a power house; that it is a little distance towards Washington from that platform; that when the car struck his brother it carried him to about the middle of the power house, but that is not very far; that the car stopped soon after it struck his brother; that after his brother was struck he was kind of sitting up opposite the front part of the car by the second wheel of the front; that there is no place to get off on the other side of the back platform to walk down to the Baltimore & Ohio tracks; that there is a kind of a path, but it has no boards; that there is no platform or nothing over on the other side of the road next to the Baltimore & Ohio tracks; that there is one house below there a piece, but that at that point there are no houses on the side of the electric railway next to the Baltimore & Ohio; that it is woods after you get to the Baltimore & Ohio—a little woods; that from the trolley tracks to the Baltimore & Ohio tracks it is about as far as (indicating) about 15 or 20 feet; that as you leave the trolley tracks there is a pretty steep place there; that there is no road there but a path; that when he got down
19 near the tracks and began to wave and holler the car was about as far from the Riverdale end of the platform as that post (indicating); that he couldn't tell exactly how far it was away; that it was about as far as from him to that post with the distance from him to that table added and (that distance was measured and is 28 feet); that it was pretty near the platform when he began to wave and holler; that he and his brothers were not in the habit of playing down there on the railroad tracks; that they played down there on that day, but that they were not playing on the railroad tracks or on the platform; that they were playing by the power house; that they went over to the platform and just stood there looking to see if the car that his mother was on was coming; that they were not in the habit of going over there on the track and playing; that he saw that opening in the track before his brother got his foot caught there; that he had gone across the track before, but never played there; that he went across the track and went down to the lake and branch about a half a mile from there; that he never

went down to the track to play, but a few times went down to the power house; that the power house is about as far from the track as (indicating) 15 or 20 feet; that he used to run across the trolley track and the railroad track down the hill to the other side; that he would not run across the trolley track, but would walk across; that he used to play in that gutter between the railroad tracks and the trolley tracks; that between the two railroads there is a hollow
20 where he used to go to play, and in so doing had to cross the trolley tracks; that he never got his foot caught in that place.

On re-direct examination the witness identified a photograph of the scene of the accident and pointed out on the photograph the point where the plaintiff was when his foot was caught and the place where the witness stood when he waved to the motorman and testified that he went down to meet his mother because she said she would be home Sunday evening.

JOHN E. BURCH testified: that he was a blue printer; that he lived in Berwyn, just beyond Riverdale; that he had lived there for about fifteen years; that he was familiar with the Riverdale crossing; that he got on the car which caused the accident at Berwyn; that it was either the last Sunday in August or the first Sunday in September; that he was in either the last seat or next to the last on the left hand side of the car coming to Washington; that the car stopped with a jolt such as to make him rise up and look out of the window; that he saw two little boys out on the bank and heard them crying that the car had run over Charlie's leg; that the first truck had already passed over his leg; that the motorman and conductor picked him up and put him on the front platform of the car and brought him to town; that he thought the injured boy was about the middle of the car; that the rear end of the car was about one half its length from the platform; that it was a closed car; one of those large green cars that run up G street to 15th; that the bones were sticking out I suppose two or three inches and it, the leg, was merely hanging by a muscle: that the prin-
21 cipal injury was about half way between the knee and ankle; that when he first felt the jolt the brakes were put on; that the jolt was unusual enough to make him get up out of his seat; that he could not tell about how far the car went after he first felt this sudden jolt before it stopped; that when he first felt the jolt he could see the little sub-station there by looking out of the side windows up in the front part of the car; that he saw two little boys out on the side just about the time the car stopped, on the right hand side as you come in; that they were up on the little embankment there on the side of the track right close to it 10 or 15 feet away; that they were jumping up and down and hollering; that the track was straight he supposed for 500 yards or more from the crossing towards Riverdale; that there was nothing that he could see in the way at that time to keep the motorman from seeing the crossing; that it was in the afternoon about two or three o'clock.

On cross examination he testified that the windows were open; that he did not see anything of any of the boys until the car had either stopped or was about to stop; that he could have seen them if he had been looking; that the car was stopped quickly after he felt the jolt; that it was the unusual jolt that attracted his attention; that the injured boy was lying on the ground about midway of the car he thought; that it was his estimate that the rear of the car when it stopped was about half the length of the car from
22 the crossing; that he meant by the sub-station the little building there that was used for the distribution of power. Mr. Worthington agreed that it was not a station for the use of passengers.

On re-direct examination he testified: That the cars always stop at the crossing whenever there is anybody to get off or on there; that he noticed signs there on each side of the track up against a post right at this crossing "Cars stop here;" that the sign had been there ever since he could remember; that he examined the space between the rail and the planking there; that it was such that a child could get its foot caught in it; that the space was about the same width all the way along on the side where the boy caught his foot; that he didn't measure it; but that he guessed it was about three inches or something like that.

On re-cross examination he testified: That all he knew about the width of this space was his estimation of it by looking at it.

23 WILLIAM B. SEVERE testified that he was superintendent of the mail bag repair shop Post Office Department; that he has lived at Riverdale three years; that during that period he had been coming into town on that line of cars; that on the day the accident happened he was at Rehoboth Beach with Mrs. Severe; that they got back about midnight; that Saturday they had anticipated returning about two o'clock that Sunday afternoon and had so notified their household; that when he got home he did not see the injured boy; that he saw him the next day, Monday afternoon, at the hospital with his leg amputated; that they had always used the crossing; that they habitually took the car there; that he noticed that other people went to the same point to get on the cars and that the cars stopped to let off passengers going either way at the platform; that there was a sign on the trolley pole right between the tracks "Cars stop here;" that the sign had been there as long as he could remember; that all the time he had been living there the cars had been making that their stopping place; that when he and his wife went to Rehoboth Beach they left behind his father, colored cook, colored man, his brother, who was in town at the time, and his four boys, (the oldest of whom was away at school that afternoon), who composed his household.

The witness was here asked by plaintiff's counsel what instructions he gave his boys as to going on the railroad track, but upon objection being made by defendant's counsel that this was immaterial, the question was withdrawn.

The witness further testified that he observed the place
24 where his boy was hurt; that he went down and examined it very closely; that he noticed where his foot had been caught between the flange of the rail and the board of the platform; that there were drips of blood all along the track for about 12 feet or more; that the drippings of blood on the platform commenced near the end towards Washington; that he measured it with a tape line one day shortly after the accident; that the width of the space where he saw the drippings of blood was about three inches; that the boy was wearing shoes that day; that the witness has the shoe the boy wore (and thereupon produced the shoe in open court); that he recognized it as the boy's shoe, which he had on at the time of the accident. (And said shoe is hereby made a part of this bill of exceptions.)

Counsel for the plaintiff offered to prove by the witness that in October following the accident the defendant filled in with gravel the space between the planks and the rail where the plaintiff's foot was caught, but on objection by defendant's counsel the evidence was excluded.

On cross-examination he testified that he measured the space between the planking and the rail some time in October of 1902; that he could not get the measurement exactly with a tape line as there was nothing but inches and half inches marked on it; that it was over two and one-half inches about three inches by the tape line as near as he could remember; that the same plank is there today as was there then, and it was in exactly the same position and the same rail was there; that he got leave for ten days and went to Cape May; that in coming back failed to make connection to reach Washington Sunday; so that he went to Rehoboth Beach and stayed there until Sunday afternoon at five o'clock.

On re-direct examination he testified: That the distance from the crossing where the boy's foot was caught to his house was, he guessed,
25 about four to five hundred feet; that he would say it was about 400 feet from the platform to the lines of his yard; that from the gate to his house was close on to two hundred more.

WILLIAM B. SEVERE, recalled for further direct-examination, testified: That at the time he made the measurements at this place he made a plat and a copy; (the witness produces the paper) that the space between the board and the rail according to the measurements was two and eleven-sixteenths inches, that was from the top of the rail to the edge of the platform.

On cross-examination the witness testified: That from the near side or edge of the rail to the edge of the platform, top opening, was two and eleven sixteenths inches; that the opening below from the edge of the platform to the center of the rail was three and one-fourth inches; that that was the "T" rail.

On re-direct examination the witness testified: That the depth of

this opening between the boards and the rail at the time he examined them was about two inches from the top of the boards; that he presumed the boards were about 2 inches thick; that he didn't measure them carefully.

On re-cross examination witness testified: That he didn't know the exact dimensions of the hole as he had not measured it; that the thickness of the board is the depth of the hole; that there was no filling in there at the time of the accident that he could note; that there was some sometime in October; and that what he said on his direct examination on that subject was not that he made his measurements of the crevice in October, but that in October the company filled in the crevice between the plank and the rail with gravel.

Thereupon counsel for defendant stated that while that was ruled out on the direct examination of the witness he would not object to it now.

The witness on further cross-examination testified: That he examined the crevice a day or two after the accident, and had several friends examine it also; that his measurements were made,
26 he thought, in September the 7th or 10th; that the thickness of those boards would be the thickness of the opening; that in some cases the dirt filled it up even to the top of the ties; that the top of the board was about level or very nearly so with the top of the rail; that he used a tape line to make measurement on that day; and that the smallest measurement on it was one-half inch; that he also used a rule; that he had forgotten that; that it was by the rule that he knew it was two and eleven-sixteenths inches from the edge of the board to the inner edge of the top board of the rail, that the board was between the tracks and that the hole was upon the tracks; that there were boards on either side of the rail as well as between; that those on the outside were very near to the rail.

Mrs. KATIE E. SEVERE, the mother of these boys, testified that Eddie would be eleven next November; that the boy who was hurt, the one they call Erickson, would be nine next October; that Raymond would be seven in June; that they had lived out there over three years; that during that time they had been using this line of cars to come in and out of the city; that they had been in the habit of taking the cars right at what we call the substation, the power house; that she meant by the sub-station the power house; that there was a platform there where they could get off and on; that the platform was just a crossing; that the platform was on both sides of the track; that it crosses all four of the rails of
27 trolley tracks and extends outside of them; that there was a sign there on the post "Cars stop here"; that everybody in that locality used that platform both for getting on and getting off; that the day the boy was hurt she was away and got back about mid-night Sunday; that she wanted to get home earlier, but could

not make connection; that she sent word that she would be home in the afternoon; that she notified them at home that she expected to get there some time Sunday afternoon, but they couldn't tell exactly because they had been already delayed.

CHARLES E. SEVERE testified: That he was eight years old and lived in Riverdale for about three or four years; that when he got hurt he was down there on the crossing; that it was a warm Sunday, in the last of August, about two or three o'clock in the afternoon; that that afternoon he was down there waiting for his mother; that he was on a little step sitting down in front of the door of the power house; that he did not know how far those steps he had been sitting on were from the trolley track; that he guessed about two or three feet; that Raymond and Eddie were sitting there with him; that they thought they heard a car coming and looked out to see if it was coming and there was none coming; then Eddie ran up to the house to get a drink of water and Raymond's foot got caught; that he did not see what Raymond was doing when he got his foot caught; that he didn't notice him until he was caught, but then he (Raymond) told him and he helped him out and just as he was going back his foot got caught in the rail as he was crossing over to the station; that his foot was caught in the middle part of the platform;
28 that Raymond's foot when he was caught was sort of slanting and witness could just twist it out, but witness' foot was across like this (indicating) and he couldn't get it out any way; that he couldn't get his foot out; (produces and identifies the shoe he had on at the time of accident); that Raymond went up to tell Eddie that he couldn't get his foot out and Raymond met him at the gate and Eddie came running down, and that just as he got to that little ditch with two boards there he (Eddie) saw the car coming and so did he (witness); that his back was to it; that when he heard the car coming he turned his head to look and see if it was a car and he was waving his hand; that he could not see the car while he was waving; that when he first saw the car it was about as far from him as it is to that post (indicating the same post referred to by the witness Eddie) at time of accident; that Eddie was down there when he saw it; that he Eddie, was waving his hat up and down and hollering to the motorman; that Raymond came down behind Eddie; that he was waving too, both of them; that he heard Eddie holler for the man to stop; that he couldn't see whether he (the motorman) was stopping until he (motorman) got close to him, and then he noticed him and didn't notice him before; that he saw him turn the brake to stop it; that he saw the car stop; that then he was right by the middle of the power house; that it is about two or three yards from the place where his foot was caught; that that is about as far as he was dragged.

On cross-examination he testified: That it was his left foot
29 that was caught; that he saw Eddie when he first got down there on the two boards; just as soon as he stopped on the

two boards; that he never saw the car until Eddie got down there; that when he saw Eddie he turned around, and just noticed the car about as far from him as from here to that post (indicating the same post before referred to); that he saw Eddie first and just as he was getting ready to turn around he saw the car; that he did not wave his hat any until he saw the car; that Eddie began to wave his hand just the same time he did; that when he first saw the car it was right close on him; that Eddie commenced waving about the same time; that as soon as he saw Eddie waving he turned his head and saw the car and it was right on him, as near as the post; that he had not heard the car before he saw it; that he was down there on that crossing a good deal; that he thought the car was coming and was running down there to see if the car was coming; then it seemed to them as if they heard the car and they ran down there to see if it was. Witness was running across the track to see, and when Raymond got there his foot slipped in some way or other and then witness stopped and pulled Raymond's foot out, and Eddie was up at the house calling to grandpa where was the cup; that he did not go down there often before that day and play on that platform; that he never went there to play in front of the cars; that he went down there a good deal and went across there going down to the branch sometimes to go fishing.

JAMES SEVERE, a witness called by and on behalf of the plaintiff having been first duly sworn, testified: That he was the father of William B. Severe and grandfather of the boys; that at the time the accident happened to the little boy he was living at his son's house; that he supposed it was in the neighborhood of three o'clock Sunday afternoon; that he remembers Eddie coming up to the house just before the accident happened; that he, the witness, had just fastened the screen door, and was going up stairs when he heard Eddie rattle at the door; that he didn't go up stairs until Eddie went away; that it must have been fifteen minutes or something like that before he heard of the accident.

On cross-examination the witness testified; that it may have been more than fifteen minutes after Eddie went to the house before he heard of the accident.

On re-direct examination the witness said it might have been less than fifteen minutes; that he couldn't tell exactly.

The counsel for the defendant thereupon admitted that the defendant Allan L. McDermott was on the 11th day of October A. D. 1901, by an order passed on that date by the supreme court of the District of Columbia, in a case then therein pending wherein The United States Mortgage & Trust Company, The United States Electric Lighting Company, The Anacostia and Potomac Railroad Company and The Columbia Railway Company were complainants and The City and Suburban Railway of Washington, was defendant, being equity cause No. 22663 in said court appointed as receiver of The City and Suburban Railway of Washington, and that on the 14th

day of October, 1901, by an order of the circuit court of the United States for the district of Maryland passed upon an ancillary bill filed in said last mentioned court by the said complainant
31 against the same defendant the said appointment of the said defendant as such receiver by the supreme court of the District of Columbia was ratified, approved and confirmed by the said circuit court of the United States for the district of Maryland and that during all the time from and after the date of the passage of the order last aforesaid to and including the time of the trial the said defendant was in possession of and operated and controlled the said City and Suburban Railway of Washington under the direction of the said courts.

The plaintiff's brother, Raymond, who was six years of age at the time of the trial was offered as a witness for the plaintiff, but the presiding justice, after questioning him held that he had not sufficient capacity, on account of his youth, to justify having him sworn as a witness in the case.

Counsel for the plaintiff offered in evidence the Carlisle tables of mortality, as bearing upon the plaintiff's expectation of life, but on objection to them being made by defendant's counsel, the offer was withdrawn.

The defendant's counsel admitted that the railroad company put the planks down that make the crossing in question, and that the defendant as its successor, was responsible for it.

Here the plaintiff rested.

32 And thereupon the defendant, to maintain the issues on its part, introduced the following evidence:

George M. Walker testified: That he resided in Hyattsville about four hundred feet from the line of Riverdale; that he was familiar with the locality where the accident is said to have occurred; that he had walked up and down the tracks there in the neighborhood of it very many times; that there was a street laid out down to the railroad; that there was no street on the other side of it; that the Baltimore & Ohio railroad was about thirty-five or forty feet from the electric road; that the Baltimore & Ohio and electric tracks were nearly parallel there at that point; that the Baltimore & Ohio was on the east side of the electric road; that the land along there between the electric tracks and Baltimore & Ohio tracks varied by a depression there; that in some places it was very deep and in some places it was above grade line; that at the crossing it was probably twenty inches or so from the platform of the electric cars off down to about two feet or more; that the street was not open or used on the other side of the railroad; that it stopped abruptly at the platform.

On cross examination he testified: That there was no possible way of driving across there, and hardly a way to walk across; that he was not employed by the railroad company; that he was summoned by the railroad company.

(It was subsequently admitted by counsel for the defendant that this witness voluntarily appeared without a subpœna.)

33 The witness further testified on cross examination that he had no doubt that people cross there, but did not suppose that it was used habitually; that it was a very uneven place to cross over; that he couldn't say that no one used it; that there may have been a small foot path that ran down east of that crossing; that he didn't notice; that witness may have crossed there once or twice himself; that it was very difficult passing, but he had crossed there

ERNEST F. HAWKINS testified that he was a motorman of the Washington Railway & Electric Company; that he had been a motorman ever since the line had been in operation; that he was motorman on the car that injured the boy; that the car was running on the Washington bound track at the time; that he saw the boy before he was injured; that he saw him when he was about three or four poles back—about three or four hundred feet—the poles that trolley wires are run on; that he did not know how far apart the poles were; that when he first saw the injured boy there were three boys there on the tracks running and jumping backwards and forwards across the tracks; that they were on the platform or crossing; that he sounded his gong as he approached where they were; that he was back about one hundred and fifty feet when he first sounded his gong; that when he rang his gong two of the boys got back on the bank; that the other one stayed there standing on the track; that he rang his gong repeatedly from the time he first rang it until he reached the boy, but didn't know how often; that when he saw the boy was not going to get off the track he was about

34 thirty or thirty-five feet away from him; that he was pretty close on him when he made no effort to get off; that he applied the brakes with all his power and reversed the power; that to reverse the power causes the wheels to turn backwards and it stops quicker; that after he reached the point where he saw the injured boy was not likely to get off the track that he applied the brakes to the best of his ability and reversed the power and he stopped the car as quick as he possibly could; that there was no means upon the car for stopping it which he did not use; that when the car came to a stop it was a little south of the crossing the boy was on, before the accident, a little towards Washington; that before the accident the boy was near the Washington end of the crossing; that after the car stopped he got off the car at the back end; that the back end of the car was at or near the south end of the platform; that the boy was south of the crossing about opposite the center of the car; that the boy was put on the car, brought into Washington to 15th and G streets, and transferred from there to the Emergency Hospital wagon, that he had often seen the boy before on the track at that crossing and at Riverdale station and anywhere along between that crossing and Riverdale; that he had seen him remain on the track after he sounded his gong while the

car was approaching him; that he did not know how often that boy would stand on the track until the car got almost to him and then he would jump off and clap his hands and laugh at the motorman lots more than once; that he had seen this boy in company with other boys do the same thing; that he does not know how
35 often he had seen this, but lots of times; that the first thing he saw or heard on the occasion of the accident that indicated that the boy might not get off the track was that he saw his foot hung; that he was then about thirty or thirty-five feet from him; that all he saw was three boys running back and forth; that he did not see them making any motion; that he did not hear any of them screaming at any time.

On cross examination he testified: That he had known the boy's face for a couple of years; that he knew the faces of the other boys around there; that he knew the two boys who were with him were his brothers because they all favored one another; that there was a family resemblance; that that was the only way he knew; that there was no other boy there except these three boys; that he didn't see any other person at the crossing except the boys; that they continued to run backwards and forwards until he got within one hundred and fifty feet of them; that all three of them were running backwards and forwards across the track, playing, running and jumping across the track; that he was traveling at about eight or nine miles an hour; that one boy stopped on the track and the other two boys got off when he rang the bell; that the two boys got off on the side next to the sub-station; that the boy who remained on the track remained stationary from that time on until he was struck; that the other two boys were over on the bank; that neither of the other two left their place from the time the injured boy became stationary until the car struck him, he thought, not to his knowledge; that when he got down near the boy who was struck the other two boys were over on the bank on the right hand side;
36 that he did not know whether they were standing together or not; that he did not see either of those boys wave; that the boy whose foot was caught did not wave to him; that the boy was standing with his face towards him; that he does not know whether the boy turned around or not, but that he saw his face; that he did not recognize him until after he was struck; that the boy's face was towards him before he was struck; that it was broad day light; that he didn't know at that time that the boy was one of the three boys—not until he got off; that he didn't recognize the other two boys before he struck the plaintiff as being two of these three brothers; that he made a statement in writing to the company about the affair; that the rules of the company required him to make such report; that he made it on that evening after the accident; that he had not seen it since he made it; that he had not made any statement to anybody since he made the written report, nor to any agent of the company except to counsel. At the request of counsel for plaintiff counsel for defendant handed him the written report re-

ferred to by witness and the same was read to the jury and is as follows:

Accident Report No. —.

C. & S. Md. Division.

Name of person Charlie Severe. Address Riverdale.

Vehicle { Owner —— ——. Address —— ——.
Driver —— ——. Address —— ——.

Color White Sex Male Age —.

37 1. Date August 31–'02. Time 3.06 p. m. — m.
2. Place (at crossing between streets): Name street? Riverdale, sub station.
3. No. of motor 403 No. of trailer — Direction bound west
4. Was car stopping, standing, starting or running? Speed — miles per hour 6 miles per hour.
5. Position of person or driver, and what doing just before and at time of accident standing perfectly still. Made no signal that he was fast in track.
6. In what manner did person undertake to get on or off car? —.
7. What signals, if any, were given by person? None whatever.
8. Was person injured, if so, state nature of injuries? Leg cut off.
9. What did person say at time of accident? Take me home to mama, my foot is cut off.
10. Was person able to walk? No.
11. If removed from place, how and where taken? To Emergency hospital on the car to 15 and G Sts.
12. Kind of vehicle — Single or double — Number — Direction bound —
13. Speed of animal or vehicle, walking, trotting or running? — miles per hour —
14. Number of persons in vehicle? — — —
15. Damage to vehicle or injuries to animal? — — —
16. Number of passengers on car at time of accident? 5 passengers.
17. Position of conductor, and what doing just before
38 and at time of accident? On rear platform.
18. Position of motorman, and what doing just before and at time of accident? Trying to stop all I could.
19. Was any other car near or passing at the time of accident? No. If so, give number and name of crew?—
20. State of weather? Clear. Condition of rail good.

Motorman's Statement of Accident.

On my Berwyn trip, 3.00, p. m., when at Riverdale near sub sta. D noticed 3 boys playing on the track. One of the boys was standing on the track as though he was going to move off at any time. He was standing perfectly still. When about 40 ft. I could see his foot was fast in the track. I immediately applied brakes. Seeing they was not going to stop car I reversed the current, stopping about 6 or 8 ft. past after cutting his leg off.

Residence Brookland, D. C. Signature E. F. Hawkins.

Badge No. —."

Witness further testified: That there is a bank on the west side of the road that came down to the railroad to a little incline; that the bank was then about two feet high; that the other two boys got off the track and were off on the bank; that they were just standing there with their arms down; that both of them had their hats on; that he did not know how they were dressed; that the length of the car he supposed was between thirty-six and thirty-eight feet; that he saw that the boy's foot was caught before he struck him; that he did not know whether his left foot was in between the
39 track and his right foot outside and turned around, but he saw the boy's face.

On re-direct examination he testified: That when the boy was standing on the track, as if he were going to move off, was not the first he saw him; that when he first saw him he was playing and running across the track.

JOHN GREENSMITH testified: That he lived at Newport News, Virginia; that he had been for nine years general foreman of the maine machine shop of the Newport News Shipbuilding and Dry Docks Company of Newport News; that he was on the car that injured the boy; that his attention was called to the motorman by his ringing the bell repeatedly; that he looked out and saw a small boy; that is he saw a larger boy than the boy that was injured, in the center of the track, to the best of his knowledge and belief; that it was a good while ago and many events have happened since; that the boy he saw in the center of the track was waving his hand; that he then turned away and didn't look out until after that for he did not think anything of it as he had often seen the same thing occur in other places; that he did not see the little fellow; that the next thing that occurred was that the motorman stopped his car; that that was what called his attention to the front of the car again; that the car just jumped, you could feel a jolt; that he believed the motorman was trying all he knew how to stop the car; that the motorman was putting on the brakes with all the effort he could; that he thinks he stopped the car within 30 seconds or less—not

over; that the wheels were slipping; that he could not say
40 how many times the gong was rung before he looked out; that it was the repeated ringing of the gong that called his attention to it; that at that time the boy was standing in the center of the track; that he did not see the boy that was run over at all; that he only saw one boy; that he was riding in the front part of the car in the second seat facing the motorman; that his face was to the motorman's back; that he was simply taking a pleasure ride.

On cross-examination he testified: That he was sitting on the left hand side; that the car had glass windows and doors; that he could look down the track; that when he first looked out he was fifty or possibly thirty-five feet from the place where the car stopped or it might have been a little further or less; that the boy was about as far from him as to the corner of that room (indicating the same corner referred to by Eddie Severe); that he could look down the track and see on both sides of it where the boy was for some distance; that there was no body in sight that he saw except the one boy; that there were not three boys running across the track and playing that he saw; that he saw that there was only one boy; that he was not standing still; that he was waving his hand; that he did not see any other boy; that he couldn't see the boy that was injured for the reason that the motorman was there and he couldn't see on that side; that he couldn't see down the track on the side where the motorman was; that the boy he saw standing waving his arms was a little larger than the boy that was injured according to his recollection; that he did not notice whether the boy that
41 stood in the middle of the track had a hat on; that when he first saw the boy the motorman was ringing his gong and that was what attracted his attention; that he then saw the boy wave and the next thing he noticed was the sudden jolt when the motorman applied the brakes, and that was what made him turn around and look and just about a moment after he put the brakes on there was a jolt and the car raised up; that he couldn't say how far the car had gone from where he first noticed the boy before he felt the brakes.

MAURICE E. SPALLING testified: That he was a conductor on the City and Suburban Railroad Company, and had been for eight years; that he was on the car that injured the boy; that he did not see the boy before he was injured; that at the time the accident happened he was on the rear platform of the car; that he noticed the sudden stopping of the car, which was a good deal more sudden than usual; that the rear end of the car was just at the end of the platform when it stopped; that when he stepped out of the car he stepped on the platform; that the injured boy was opposite about the center of the car.

A. S. BRYANT testified: That he lived near Berwyn; that he had lived there not quite a year; that he lived in the neighborhood of Berwyn at the time this accident happened; that he was on the car that injured the boy in either the first or second seat from the
42 rear on the left hand side coming towards Washington; that as he approached the place where the accident occurred he got up and walked across to the opposite side and looked out of the window; that the car at that time was between sixty and one hundred yards from the place where the injury occurred; that he could see the crossing as he looked out; that when he looked out he saw three boys standing on the platform on the edge near the substation; that they were on the right hand side of the track the car was running on; that there were three boys just standing there; that he did not think they were near enough to the track so that the car would strike them; that they might have been though; that he did not observe all the time until the car got down there; that he just looked out and walked back to his seat; that he hadn't sat down until the car ran over the boy; that he had his hand resting on each seat on each side of the aisle as well as he can recollect; that the car stopped very suddenly; that he thought that probably caused him to stand there instead of sitting down right away; that he got off the car at the rear door; that the rear wheel of the car was standing on the seventh tie from the Washington end of the platform of the car; that he doesn't remember how near the end of the platform of the car was to the end of the platform he stepped off on.

On cross-examination the witness testified: That there used to be a pond there on the right side of the road; that he doesn't remember whether he had got down opposite to the pond or not when he looked out of the window; that he didn't think they were quite to the pond; that they were somewheres about that point; that
43 nothing had happened to the car to attract his attention when he looked out; that it was not because of any noise made by the ringing of the gong or anything of that kind that made him look out; that when he looked out three boys were standing absolutely still on that little platform; that he didn't see them running; that if they had been running backwards and forwards across he probably would have seen them; that the nearest boy was probably a few feet from the track; that he just glanced out of the window and started back to his seat; that he didn't take notice whether the bell was ringing long before the car began to stop; that he didn't recollect any bell; that it may have rung, but he didn't notice it; that he didn't recollect that it had rung at all; that he counted the ties from the rear wheel back to the platform.

THOMAS W. PHELPS, having been duly sworn testified, on behalf of the defendant: That he was and had been for about four years a motorman of the City and Suburban line; that he had been running there continuously ever since the road started, and was familiar

with the place along where the accident happened; that he was not acquainted with the Severe boys, but (upon seeing the boys in court) he recognized the little boy on crutches; that he didn't know about the other two; that he couldn't remember whether prior to the accident he had seen the injured boy standing upon the track; that he had frequently seen boys playing along the track; that they would jump out and run across ahead of the cars; that he had seen them stopping and standing on the platform and stopping the cars as they would go along and then running away laughing after the motorman had stopped; that he had observed this at this particular place and at all the stations along there and that it was a frequent occurrence.

HARRY T. KNIGHT, called by and on behalf of the defendant, being first duly sworn, testified: That he was a map engraver at the Geological Survey, and had resided at Riverdale for six and half years; that his house was in the same block with Mr. Severe's, about two hundred and fifty feet away; that he knew the Severe boys prior to this accident and he had occasionally seen the three young Severe boys playing, talking, and standing on the railroad tracks down near where the platform is and where the accident happened; that he couldn't tell exactly what they were doing, but he had seen them with his own boys running around the platform and off and on; that he could not say that he had ever seen the boy who was injured standing on the track and jumping off as the car approached; that he had seen the Severe boys, his own boys and other boys prior to this accident standing on the track at that point as the car approached and jumping off as it did approach; that he couldn't say how many times he had seen that done prior to the accident, but that it was quite often during the summer; that that was the time he was at home most.

On cross examination witness testified: That his boys, who mingled with the Severe boys, were eight and eleven years old; that he took precautions to stop his boys from playing there after this accident; that he had reproved them before the accident; that when he saw these boys around there "they would run backwards and forwards along on the platform and around the power house. In fact they made it a regular play ground;" that it occurred right often when the boys would stop in front of a car and when it would come up they would jump off just before it got there; that when the boys were doing this he was in his garden; that the corner post of his garden was within thirty feet of the railroad track; that when the boys were on the track the motorman would not do anything except ring his bell, and then the boys would jump off.

JAMES B. LACKEY, called by and on behalf of the defendant being first duly sworn testified: That he was secretary of the defendant company; that he went to the scene of the accident about half past four o'clock on the Sunday it occurred. The following questions

were then put to the witness and the following answers were given by him:

Q. You are the secretary of this company, I believe? A. Yes sir.

Q. And also of each one of these other street railway companies here, except the Capital Traction? A. Yes, sir.

Q. I would like to know whether you went to the scene of this accident soon after it occurred, and if so, how soon? A. I should say I was there about half past 4 o'clock; between 4 and 4.30.

46 Q. Was that on the day of the accident? A. Yes, sir; on Sunday afternoon between 4 and 4.30 o'clock.

Q. I wish you would tell us whether, at that time, you measured this space between the track and the board, where this boy is said to have gotten his foot caught? A. I did.

Q. How wide was it? A. It was a scant 2⅛ inches.

Q. How did you measure it? A. I measured it by putting my heel in it. I tried to shove my heel down into this point; but I couldn't get the heel into it. I didn't have a rule and I shoved my heel down to see if I could get it down. The heel would not go in.

Q. How much did your heel measure at the widest point? A. At the widest point it was a scant 2⅛ inches. That is as much as I could get into the hole.

Q. How much do I understand that the heel you had on at that time measured, at the widest point? A. The widest point up here (indicating) would be about 2⅛ or 2⅜ inches.

Q. At the point where you could get it into the space how much did it measure? A. A scant 2⅛ inches.

Q. Where it would go in? A. Yes, sir.

47 Q. Where were you when you measured the heel? A. At my office the next morning.

Q. And with the same shoe that you had on the day before? A. The same shoe. I did not have a rule with me on Sunday.

Q. At what point in the track did you make this measurement? A. My best recollection is I measured it off with my two feet like that (indicating) and it was about 22 or 24 inches from the Washington end of the platform.

Q. Why did you select that point? A. I examined the crossing, and from that point towards Berwyn there was no indication that there had been anybody or anything dragged across, that scraped on the platform except at that point.

Q. You measured at the place where the scraping of the platform showed itself? A. Yes, sir.

Q. Did you notice whether that space was the same or about the same all the way along, across the platform? A. It may have varied an eighth of an inch or a quarter of an inch, maybe.

The shoe produced by the plaintiff as the one he had on the injured foot at the time of the accident was then shown witness and he testified that he measured it yesterday and that at the widest

point the shoe measured a scant two inches; that when he made the measurement at the place of the accident Mr. Mersheimer was
48 with him; that the crossing that they have there is the standard crossing of street railroads in this city; that he has been secretary of this company for five years and for some of the others for a longer period. As bearing upon the opportunity he had to learn of accidents which occur on the road he testified that before 1901 he supervised the claims department, which was then under a claim agent, and since 1901 he had had charge of it directly; that prior to this accident no other accident which occurred in like manner had come to his attention; that no accident from getting their foot caught into one of these openings between rail and boards had ever happened to anybody else that had come to his attention and they had never had one since that; that the day he made the measurements he did not measure the depth of the hole; that he observed that the bottom of the place was gravel.

On cross-examination the witness testified: That he was not an engineer and had nothing to do with the operation of the road or construction of it, but he observed in relation thereto that they did not have such construction within the city limits; that it is all underground construction within the city limits; that they have a crossing like the one in question on the Columbia and on the Bennings road, and some on the City and Suburban; that the nearest crossing to this one, which is like it, is just this side of the District line; that, after you turn at Fourth street, northeast, and go towards Hyattsville there are several of those crossings on that line; that where the railroad track runs along a public street you put down gravel or something solid, but where
49 a public street crosses the private right-of-way board-crossings are put down; that they put in the planks at this place because the right of way deed required it; that there was a subdivision of this piece of property and the deed which gave them the right of way said that wherever a street was shown they had to put a plank crossing; that it was put there because they had to do it according to the deed and not for people to walk on; that there is a post there marked "Stop here" and that it is a stopping place if there is anybody to get on; that they could not walk along there; that the crossing was not put there for the use of people when they get off and on the cars; that they used it for that purpose a great deal; that when the people are coming from Washington they come down to this station and get off there, that the people did use the platform; that it was of standard construction where there was a crossing.

On redirect examination the witness having identified the papers giving them authority to run over that street testified that that plank was laid in pursuance of the requirements of the papers.

There was then proved and offered in evidence the following papers referred to by the witness, to wit: An order of the county commissioners of Prince George's county, Maryland, in the words and figures following, to wit:

EXHIBIT J. B. L. No. 1.

Ordered this 7th day of November, 1895, by the county commissioners of Prince George's county that permission be and is
50 hereby granted unto the Columbia and Maryland railway, a corporation, duly incorporated, to use the bed of any street or streets and to cross any streets in the several subdivisions and towns known as Wilen Heights, Holliday, Riverdale Park, Romona, College Park, Lakeland, Lansburg, Kane & Company, Beltsville Land Improvement Company, Muirkirk, Lafayette, Berwyn and Fairlawn, provided said Columbia and Maryland railway has acquired or shall hereafter acquire by grant or condemnation the fee in said streets from the corporations or individuals owning said subdivisions for the purpose of a right of way for the said railway and also in any case where said railway has the consent of the proprietors of said subdivision to so use said streets and provided further that said railway company shall comply with section 234 of article 23 of the Code of Public General Laws and provided further that nothing herein contained shall be construed as an assumption of obligation of the county commissioners to repair or take charge of said streets.

I hereby certify that the aforegoing is a true copy of an order passed by the county commissioners of Prince George's county.

In testimony whereof, I hereto set my hand and affix the seal of said county commissioners.

[SEAL.] THOMAS E. WILLIAMS,
Clerk County Comms., Prince George's County, Md.

Also an agreement between the Riverdale Park Company, Samuel S. Bond, and the Maryland Traction Company, in the words
51 and figures following, to wit:

This agreement, made this 25th day of July, A. D., 1898, between Riverdale Park Company, Samuel S. Bond, parties of the first part, and the Maryland Traction Company, a body corporate, party of the second part,

Witnesseth, that the said Riverdale Park Company, Samuel S. Bond in consideration of the sum of one dollar to each of them in hand paid by said Maryland Traction Company, the receipt whereof is hereby acknowledged, hereby respectively agree to grant, release and convey unto the party of the second part the right of way over and along Maryland avenue, being a street laid out and located in the subdivision known as Riverdale Park, Prince George's county, Maryland, for the railway of said Maryland Traction Company, the said street being fifty feet wide, and also agree to duly grant and convey for the purpose of widening said street a strip of land ten (10) feet wide from the front of their respective lots, fronting on said

Maryland avenue, as shown on plat number 34 of the right of way records of said party of the second part, and to execute and deliver proper grants and conveyances of the same, with an unencumbered title, when demanded, upon the following conditions:

1st. That the railroad of said party of the second part shall be constructed in such a way, with plank street crossings that vehicles can readily cross its tracks at intersections of the said street with any other street.

2nd. That the space on the west side of the railroad tracks
52 after leaving sufficient room for the road bed and tracks of the said party of the second part shall be graded and so arranged that vehicles can pass along the same parallel with the said railroad.

3rd. That the cars of said party of the second part shall not be kept standing at the said street intersections so as to prevent the free crossing of said railroad by vehicles.

4th. That the said party of the second party, agrees to stop its local trains at the said street crossings on signal to take on or let off passengers.

Witness the hands and seals of the said parties of the first part, and the signature of the authorized representative and corporate seal of the said party of the second part.

Test: RIVERDALE PARK CO.,
By J. BLUNDON. [SEAL.]
SAMUEL S. BOND.
MARYLAND TRACTION COMPANY,
(Signed) By W. KESLEY SCHORPF.

Also a plat of Riverdale, Maryland, which is hereby referred to and made a part of this bill of exceptions. And it was proved that the City & Suburban Railroad Company is the successor of the Maryland Traction Company and of the Columbia and Maryland railway.

Mr. WORTHINGTON: "I admit the street was not open there and was not used by vehicles." The witness further testified that Maryland avenue had never been opened so as to be used by vehi-
53 cles; that there was no travelled street laid out there in Maryland avenue at that point; that there is no way along there for a wagon to pass; that he couldn't say nobody walked along there.

FRED J. MERSHEIMER, called by and on behalf of the defendant, being first duly sworn testified; that he was a special agent of the claims department of the railroad company; that he observed Mr. Lackey try to put his heel in that space and observed the situation of the land there; that Mr. Lackey could not get his heel into that space; that he saw the measuring of the heel in the office the next morning; that it measured two and one-eighth inches; that he had

been connected with street railways since 1883, as adjuster of claims, claim agent, and special agent with this company and other roads; that he had observed plank crossings on street railroads; that in the District of Columbia it was a general observation; that he saw more of them in New Jersey; that he had more to do with suburban roads there; that there were none of these plank crossings within the city proper; that he knew that crossing in question was practically the same as all other plank crossings; that he had occasion to observe that they are all the same, particularly as to the distance between the rail and the first plank; that the standard construction generally averages about two inches; that they are not constructed mathematically accurately at that distance, but they are uniformly about two inches; that in his experience prior to the accident a similar accident caused by a person getting a foot caught in the
54 space between the rail in the track had never come under his observation; that no such accident since this one had ever come to his attention.

On cross-examination the witness testified: That he was not an engineer or had nothing to do with the roads or crossings; that the space was just about wide enough to force Lackey's heel in it; the grooves in the rails laid in the streets of the city of Washington he judges are about one and one-half inches wide; that Mr. Lackey could not get the narrow part of his heel down into the space at the crossing in question if he put his foot down flat, but by lifting his toe up he might, of course, get the back or narrow part of his heel in; that said space was just about wide enough to force the boy's heel in; that he judged that the boy's heel was about the size of boys' heels generally.

W. H. H. ALLEN called by and on behalf of the defendant, being first duly sworn, testified: That he had resided in Washington seventeen years; that he had been a railroad contractor for twenty-six years; that he had done general construction, laying tracks, ballasting, etc., that he was a member of the firm of Talty & Allen; that that firm had the contract for laying and ballasting the road bed of the City & Suburban; that he was familiar with the point of the accident; that the ballast is rock; that the size of the rock ballast was from two to two and one-half inches; that the largest piece would be about two and one-half inches and from that down to a very small size; that the ballast is about eight inches deep;
55 that the ballast is put in between the ties to bind them to the surface of the road-bed; that he was familiar with the plank crossing in question; that he was on the construction of it every day; that that plank crossing corresponded with the general and usual way of constructing plank crossings across electric railways; that it was the standard way of putting in a crossing.

The distance between the inside of the rail and the plank according to standard construction on street railroads is about two and one-eighth inches; that on steam railways it is 2¼ or 2½ because the

wheels have a little more tread; that the space was left because if anything got in on the track like a piece of ballast the flange would strike it and press it down, so that it would not derail the car; that a piece of stone tightly wedged between the planking and the rail that the wheel could not press down would derail the car; that the space is left for the purpose of guarding against the danger of derailment; that in his experience he had supervised the construction of a great many crossings; that he had been on construction work for forty odd years.

On cross-examination witness testified: That they always worked on plans and specifications and had a copy of them; that it said that they should put in plank crossings at so much per thousand; that he didn't recollect whether or not they showed how much space should be between the planking and the rail; that there was a regular rule to go by; that they had a regular space; that he didn't recollect whether that rule was contained in the specifications and plans; that the reason for leaving this space of two inches or
56 two and one-eighth instead of a smaller space is that if a stone gets in there it might not derail the car with a wide space, but if it is smaller and a stone gets in there it would derail the car; that the witness did not know but that a stone two inches or two and one-eighth inches wide getting into that space would be more liable to derail the car than a stone one inch wide getting into a one inch space; that they have to regulate the size of their space by the size of the stones; that the stones were from two to two and one-half inches, and generally give them a two inch space; that in the course of time these stones work out on the side, but you have to keep working on that to keep them in good repair; that if the stones should work out it would leave the space deeper; that they have to keep the road in repair because between the ties the ballast may work out and settle down, and they have to take the plank up and fill up the low place; that if this was not attended to the road would wear out of surface; that he did not observe this particular crossing after it was constructed; that when it was turned over to the railroad company it was inspected and was perfectly satisfactory to the company; that he had put these plank crossings in the line that runs out to the District line on the Great Falls road, and on the City and Suburban that runs out to Chesapeake Beach; that in all of them they have made the space between the plank and the rail two inches to two and one-eighth; that the size of the largest stone used in ballast has nothing to do with determining the space there of two
57 and one-eighth inches; that on the outside they put the plank close up to the rail; that the only difference is the space required by the flange.

HARRY W. FULLER, called by and on behalf of the railroad company, being first duly sworn, testified; that he was general manager of the Washington Railway and Electric Company; that he had been general manager since February 1901; that he was in Jersey

City with the North Jersey roads for seven years; that he had been in the street railway business since September 1891; that he had a broad general knowledge of what is considered good practice in railroad construction; that he was not familiar with the plank crossing at Riverdale except to know that there was a plank crossing there; that he had passed over it; that in constructing these plank crossings across street railroads in general construction the space left between the plank and the inside of the rail for flange space is from two to two and one-half inches; that as far as his knowledge and observation went that it was general and usual that the thickness of the flange that ran in the groove was 15/16 inches.

On cross-examination the witness testified; that the flange tapered toward the outer rim; that he gave the thickness of the heaviest part of the flange; that the flange at a level with the surface of the rail was ⅞ of an inch and tapered to practically nothing; that it is of peculiar shape; it is a little bit round rather than coming to a sharp edge; that in the city they have a space for the flange one inch wide.

On re-direct examination the witness testified that in the
58 city they had a guard and a grooved rail; that the guard is practically continuous from one end to the other; that the rails are put on cast iron yokes and firmly bolted in place; that tracks on roads similar to the City and Suburban are spiked to the ties; that the difference was because of the underground construction and the over-head construction; that they were not able to hold the rails as closely to gauge where they spike them to the ties as where they bolted them to cast iron yokes; that for safe construction for the play of the flange there should be left the space from two to two and one-half inches, depending on the weight of the flange; our flanges are light.

GEORGE W. DE RENE called by and on behalf of the defendant, being first duly sworn, testified: That he had been road-master on the Washington Railway and Electric Company for five years; that he had supervision of the road department, road beds, and over-head construction and everything pertaining to that department; that he was familiar with the usual construction of plank crossings over suburban roads; that he had had twenty years' experience in constructing railroads; that he was familiar with the plank crossing where the accident happened; that the crossing was the regular standard crossing that is put in all over the country on electric roads; that there is a universal standard of space left between the inner side of the rail and the planking; that it was from two inches to two and one-fourth inches; that the trackman's gauge of a crossing is the width of three fingers past the first joint;
59 that this is the universal gauge throughout the United States.

On cross-examination the witness testified: That as to the three-fingered measurements, when the witness measured he used his own

fingers; that if a man whose fingers are larger than the witness' is sent to make the measurement he uses his fingers; and that as to how that is when a smaller man is sent, they don't generally use dwarfs for construction work; that this standard is not written down or in print anywhere as far as he knew; that he did not know of any standard about the depth of it; that he was not familiar with the standard width of the flange; that that belonged to the mechanical department; that the plank fits right up close to the outside of the rail.

ERNEST F. HAWKINS recalled for further examination, testified: That from the sub-station looking towards Washington, you could see a car coming towards you about two squares or about five hundred feet; that at the time this accident happened there was not any car in sight coming from Washington; that before he reached the platform it was about five minutes since he had met the car going out from Washington.

FRED J. MERSHEIMER, recalled for further direct examination, testified: That he had not measured, but observed the depth of that hole on the day of the accident; that it was filled up with sand and dirt or gravel, and that it came up so that he could not
60 see the under side of the board; that you could not look down and see the ties; that there is about thirty feet of space between the Baltimore and Ohio tracks and this track; that when you step down here (referring to the crossing in question) you step down probably about twenty inches and then it goes down deeper into a gully or ditch; that that gully was approximately four feet deep; that there is a rise again of probably about two feet and then there is another depression; that as you approach the Baltimore & Ohio tracks you have got to walk up; that there is a wire, which he believed, was used for pulling switches, about eighteen inches or two feet from the ground; that if you wanted to get to the Baltimore & Ohio tracks you had to step over that wire; that there were no houses beyond the Baltimore & Ohio tracks; that it was woodland and lowland; that there were no houses between the electric tracks and the Baltimore & Ohio tracks; that there was no street there; that if you wanted to walk along here (referring to the place at or near the crossing) you had to walk between the tracks; that he couldn't see at the time of the accident that there were any evidences of people walking from the electric tracks towards the Baltimore & Ohio tracks at that point that there was no path across there.

On cross-examination the witness testified: That he did not observe any evidence of a path there; that he had looked for the same; that in the direction of the Baltimore and Ohio tracks he looked all along there to see what the character of the ground was; that he stood on the platform on the track there and looked as far

as he could see; that it was thirty feet or so, and that he
61 could see no evidence of a path; that the platform was fully four feet higher than the lowest part of the depressions.

And here the defendant rested.

And thereupon the plaintiff further to maintain the issue on his part, introduced the following witnesses, who testified as hereinafter stated:

WILLIAM B. SEVERE, recalled in rebuttal, testified that he had paced on a straight line the distance from the platform on the Washington side down to the power house; that it was about forty feet coming down this way at an angle; that he paced off the distance from the platform to the first post where the sign was; that it was about twenty-five feet from the platform to the edge of that post; that the sign "Cars stop here" was on both sides, so that on a car coming from Washington or going to Washington it could be seen; that he paced off the distance between these poles; that it was between ninety-five and one hundred feet; that the platform measured along the course of the road was about twenty feet; that the other way, witness said, is about thirty-two feet; that the width of the platform on the side towards the sub-station from the rail out to the edge of the platform is about eight or nine feet.

62 Thereupon, on the further redirect examination of the witness, the following occurred:

By Mr. WORTHINGTON:

Q. You have already testified about that space, where the boy's foot was cut off having been filled up in October after the accident? A. Yes, sir.

Q. I want to ask you now to what extent it was filled up, and to tell us how it was done.

Mr. COLE: That is opening up the whole case. My information is that nothing has been done there, and if there is any point to be made about that it may require me to bring my witnesses back here.

The COURT: I do not think we ought to go into that.

Mr. WORTHINGTON: I want to make my offer and take a ruling.

The COURT: I gave you a ruling the other day.

Mr. WORTHINGTON: I now offer it in rebuttal, and on an entirely different principle.

The COURT: I will exclude it.

Mr. WORTHINGTON: I would like your honor to hear the ground upon which I ask the question. I understand that the tendency of the evidence produced here to day may be that it is impracticable to have that place filled up on account of the flange coming down, and because they have to leave a space for the flange. Now when it is offered to show that a certain condition of things was danger-

ous, we have a right to show, in rebuttal, that it was fixed afterwards, that the road could operate with it after it was fixed, and that it was not necessary to keep it in the condition it was before the accident.

After full argument:

63 The COURT: I think you had better go on with this testimony.

Mr. COLE: If it stands here I have no objection to it. I understand we can prove nothing was done there, but if it stands where it is, I do not care about it, and will let it go. If he is to testify further in relation to this matter I want an opportunity to rebut it. My witnesses have gone, and I will have to send for them. I will not need all of them, but there are two or three of them I would have to have in order to prove that fact.

The COURT: What do you expect to show?

Mr. WORTHINGTON: I expect to show that after this accident happened that place was filled up, in the October following, so that it was impossible for a boy to get his foot down in there, and that it remained in that way from that time on.

After argument:

The COURT: He could get it down some distance at any rate, if it was not filled clear to the top.

Mr. WORTHINGTON: It might have been filled to the top of the plank and not filled to the top of the rail. The rail is higher than the plank.

Mr. COLE: Mr. Severe said they were about even. He said they were practically even.

The COURT: Let him state just what the depth was to which it was filled there.

By Mr. WORTHINGTON:

Q. State what filling was done in that hole, where the boy's foot was caught.

Mr. COLE: I reserve the exception.

The COURT: Yes.

A. The opening between the board and the rail, I have
64 stated, was about three inches, and between that they had filled it with sand and gravel, nearly to the level of the board.

Q. Nearly to what level of the board? A. To the top level of the board. I judge the board is about two inches thick, and that would be the depth of the hole.

Q. How did they do it; did you see it done? A. Mrs. Severe did.

Mr. COLE: I object to that and move to strike it out.

The COURT: Let that go out.

By Mr. WORTHINGTON:

Q. You saw that it had been filled? A. I saw that it had been filled.

By the COURT:

Q. How deep is that hole now? A. They have filled it in again since that. The rains have washed the sand and gravel out. I didn't take the exact date when it was done this last time; but I have noticed it in getting on and off the cars at this platform
65 every morning and evening; that he didn't know his boys ever got on the track and stood there until the car got near to them and then got off; that if it were so it had never come to his knowledge; that he had frequently given his boys instructions not to go near the tracks.

On cross-examination the witness testified: That he had not seen anybody fill up that space; that he never measured the depth of the space between the rail and the planking, and that all he knew of the depth was his estimate by looking at it, and judging from the thickness of the plank it laid on; that the last time he observed the depth of that space was the morning on which the witness testified; that at that time from the top of the planks down as far as you could put anything was two inches.

In response to a question by the court he said that from the top of the board down to the sand and gravel he would say that it was not more than one-half an inch, perhaps not that.

Mrs. KATIE E. SEVERE, recalled in rebuttal, testified that she has never before heard of her boys being on the track and standing in front of the cars or of their ever doing anything of the kind;
66 that she had repeatedly given them instructions about that ever since they had lived out there; that she had instructed them to keep away from the tracks; that she saw railroad men down about the space between the planks and the rail, where the boy's foot was caught, filling in; that they had axes and shovels; that she didn't know what they were putting in; that they were repairing the track and boards there; that she did not go down to see them.

EDDIE SEVERE, recalled in rebuttal, was examined and testified: That before this accident he had not been in the habit of going on that railroad track and standing there when the cars were coming, and jumping off before they got there; that he never did that in his life; that he never saw any of his brothers do it.

CHARLES E. SEVERE, recalled in rebuttal, was examined and testified: That he had not been in the habit of getting on the track before he was hurt and standing there when the cars were coming; that he never stood there when the car was coming until it got near

him and then jumped off; that he never saw any of his brothers do that, but that he saw a boy named Richard Garrison stand there until the car got right close to him and then he would jump off; that that was before he was hurt; that he saw him hopping the cars there a lot of times.

WM. MEYER LEWIN, called by and on behalf of the plaintiff, testified: That he was a member of the bar and of the counsel
67 for the plaintiff in this case; that he had lived at Hyattsville for eighteen or nineteen years; that he was familiar with the plank crossing of this road in that locality; that there are two crossings in Hyattsville, one called Melrose crossing, near witness' house, and the other up at the drugstore, the Hyattsville crossing proper; that two or three days after the accident happened he looked at the crossing at Riverdale, where the accident happened, and then looked at the crossing at Hyattsville, with regard to the opening where the flange ran; that the space at the crossing at Melrose and Hyattsville, was simply of the necessary depth for the flange; that it was like two dies one fitted into the other; that if there was a sheet of paper there it would be mashed down by the flange as it crossed; that at the place where the accident happened it was entirely different and was as has been described here, just the raw edge presented by this board; that the witness did not know whether the crossings at Melrose and Hyattsville were plank crossings, and did not know what was under the earth filling there, but just inside of the rails there was a board, and that was what he was speaking of; that there was no such opening in size in the crossings at Melrose and Hyattsville as there was in the one where the accident happened.

On cross examination the witness testified that he had never measured the opening between the rail and the plank at any point; that he did not know the distance between the rail and the edge of the plank, that where he looked at that he was able to say what the distance was between the rail and the plank because at Melrose he noticed that where the flange crossed there was a fresh place made; that he did not measure the distance at any of those
68 places between the rail and the plank; that he is able to say how much it was at any point if the evidence here is true about the width of the flange.

And here the plaintiff rested his rebuttal testimony.

And thereupon the defendant to further maintain the issues on his part recalled in surrebuttal a witness, FRED J. MERSHEIMER, who testified as follows: That the measurements, of the depth of the place where the boy got his foot caught, were made under his direction and in his presence within ten days or two weeks ago; that the depth at the time was one and three-fourths inches from the bottom of the gravel to the top of the rail; that at a crossing where there is quite some traffic by vehicles and otherwise, the dirt accumulates

and fills up the space in between, and the custom is to have men go along constantly and watch these places and clean them out; that wherever there is a crossing where the flange has worked its way through, if the boss finds it out the man is discharged.

On cross-examination the witness testified that he did not know when the last man had been discharged for such failure.

And here the defendant rested.

And thereupon, the foregoing being all the evidence given at the trial by either party the defendant prayed the court to instruct the jury as follows:

69 1. "The jury are instructed upon the whole evidence to return a verdict for the defendant." But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant excepted.

And thereupon the plaintiff requested the court to instruct the jury as follows:

1. "The jury are instructed that if they find upon consideration of all the evidence in the case that the plaintiff's foot was caught in the space between the planking and the rail at the crossing referred to in the evidence, so that he was unable to extricate his foot therefrom, they should render a verdict for the plaintiff, if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonably safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff h could have stopped the car before it reached the plaintiff.

"In considering the question of the liability of the defendant on either of the two foregoing grounds, the jury are instructed that they have a right to take into consideration the evidence tending to show that the place where the accident occurred was a public crossing and that it was frequented, and was known to the motorman in charge of the car to be frequented, by young children, as well as by older persons."

2. "The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such
70 sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury, and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct cause of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

And the defendant's counsel objected to the granting of each of

said instructions separately, but the court overruled the said objections and gave the said instructions to the jury. And to the ruling and judgment of the court in so overruling said objections and giving said instructions the defendant's counsel excepted separately to each ruling of the court upon each of said instructions.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

2. "If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his
71 foot caught between the rail and plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant."

But the court refused to give said instruction and to the judgment and ruling of the court in so refusing the defendant's counsel excepted.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

3. "If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonable prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant's
72 counsel excepted.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

4. "If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had ample time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and the plank, and that as soon as the

motorman made such discovery he did all in his power to stop the car before it struck the plaintiff; and if the jury shall further find from the evidence that the crossing or platform at the place where the accident happened was constructed in the ordinary and usual way of constructing such crossing in the District of Columbia, and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the officers or agents of the defendant, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possble, but whether it was reasonably to be anticipated."

73 But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant's counsel excepted.

And thereupon the counsel for the defendant requested the court to instruct the jury as follows:

5. "If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then they should not find the defendant guilty of negligent construction. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant excepted.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

74 6. ""If the jury find from the evidence that the motorman sounded the gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them; and if they shall further find that as soon as the motorman saw that the plaintiff probably would not or could not leave the track before the car reached him, he did all in his power to stop the car before it struck the plaintiff, and shall further find that the construction was not negligent, then they

should find for the defendant. And in determining whether the motorman should have commenced to stop the car before he did they may consider the fact, if they find it to be a fact from the evidence, that plaintiff and others were in the habit of standing on the track and leaving it as the car approached near them, and whether he saw any waving from anyone before he commenced to stop the car."

But the court refused to grant the said instruction and to the ruling and judgment of the court in so refusing the defendant's counsel excepted.

And thereupon, after argument of counsel to the jury, the court instructed the jury as follows:

75 *Charge to the Jury.*

The COURT: GENTLEMEN OF THE JURY, I shall be very brief in what I have to say to you about this case. As you understand, the case is based on the theory of negligence. The declaration contains two counts, one charging this defendant with negligence by reason of an unsafe construction at this point, and the other on the ground that the motorman in managing this car, did not do what a reasonably prudent man would do under all the circumstances of the case, as developed in the evidence.

Before giving you the instructions, I want to give you two or three definitions simply to get back to what we understand by the word "negligence."

"Negligence, constituting a cause of civil action, is such an omission by a responsible person to use that degree of care, diligence and skill which it is his legal duty to use for the protection of another person from injury, as in the natural and continuous sequence causes unintended damage to the latter."

Again, "Negligence is the unintentional failure to perform a duty, implied or expressly enjoined by law, whereby damage, naturally and proximately results to another."

Again, "Negligence is the failure to do what a reasonably prudent person would originally have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done."

Leaving the ordinary definitions of negligence, and coming down to the case here, it is claimed on the part of the plaintiff,
76 that this defendant was negligent because of the construction of this crossing—a place where, as the evidence indicates, people took the cars coming into the city of Washington from this suburb and at which they got off the cars in going from the city to their homes in the suburbs in this locality.

This accident occurred on the westernmost track, by the side of the westernmost rail, showing that for parties travelling on this road this was a crossing and that people going back and forth on these

cars would get off on one side or the other, depending upon whether they were going to or coming from the city of Washington.

So that, for the purposes of this case, it seems to me this must be treated as a public crossing. People had the right to be on this crossing. They must get on this crossing in going to and from the cars at this point. The cars were required to stop there on invitation and people were invited to get on the cars at that point under the testimony of this case, as I take it. So that, so far as the situation there is concerned, it seems to me it was a public place for people to go upon, for the purpose, at least, of getting on and off of these cars.

I do not think that question enters very much into this case and you, perhaps, will have no difficulty with it.

The main difficulty, it seems to me, in the case is to determine, under the situation as disclosed by this testimony, as to the
77 perilous position that children are in or liable to be in when seen upon this platform or upon this track at that point.

The construction there is said to be faulty. Of course in determining the question whether or not it is faulty, you must consider all the testimony in the case, the construction that has been used, and the reason that is given for making the construction in the way it was made; and yet if you find that it was obviously dangerous, notwithstanding that testimony, this company should not be held free from blame for adopting it. That is one question upon which you should exercise your judgment, that is upon the question whether or not there was obvious danger in a construction like this, in the width of the hole, in the depth of the hole, in view of the place where it was located and the fact that children did go on this place, which was known to the officers and employés of the defendant, and whether or not they were in the habit of crossing at that point and playing upon that track. It is for you to determine whether or not, under all of these circumstances, it was a dangerous situation and should have been observed by the defendant.

On the other question, as to whether the motorman did all that he could possibly do under the circumstances to avert this danger you will have to consider all of the testimony, not only that of the plaintiff, but of the defendant, and try to reconcile it so far as you can in order to ascertain where the fact lies. Was it prudent in that motorman, under all the circumstances of the case, to calculate that these children would be off from that track and out of
78 danger when he got there? Or was it requisite for him, as a prudent and reasonable man, to have his car under control so that he could stop very suddenly in case they were not out of danger when he got there? Of course, in determining that question, you are to consider what had been the habit of children about playing at that place. You are not to attribute any contributory negligence to the plaintiff, because this plaintiff is less than seven years of age and the law does not give him discretion. Adults have to look out for children of that kind. But at the same time he may

have been in the habit of jumping off and on that track in such a way that the motorman might have been justified in concluding there would be no danger. You are to look at all the surrounding facts and see whether that is true, whether he was justified in that calculation. There was one boy still smaller than the boy who was injured, and according to the motorman's own statement the three boys were running back and forth across the track. It is for you to determine whether or not he should have gotten into close proximity to them without getting his car under such control that he could have stopped very suddenly if necessary to prevent an accident. Of course, after he saw that the boy's foot was caught he must do everything to stop the car. But I call your attention to the time before he could see that the boy's foot was caught and ask you to consider what it would have been prudent for him to do before that time, considering all the surrounding circumstances, considering the formation of this plank crossing, of this track and of this platform, and considering the fact, as the motorman says it was a fact, that children were frequently there running back and forth. Should he have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught. Of course after he saw that the boy's foot was caught it must be his duty to stop just as soon as he can in order to prevent the accident. I have no doubt he did that. But whether he discharged his whole duty towards these children, whom he admits having seen there before that time, is a question for the jury.

79

"1. The jury are instructed that if they find upon a consideration of all the evidence in the case that the plaintiff's foot was caught in the space between the planking and the rail at the crossing referred to in the evidence, so that he was unable to extricate his foot therefrom, they should render a verdict for the plaintiff, if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonably safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff."

Of course if it was a reasonably safe method of construction, and you should find that the motorman did exercise all reasonable diligence on his part, then you must find a verdict for the defendant, notwithstanding the lamentable accident and the suffering that has been caused to this plaintiff.

80

If you fail to find that that was reasonably safe construction, and if you fail to be satisfied from this evidence that the motorman did exercise reasonable diligence, you should find for the plaintiff.

"In considering the question of the liability of the defendant on either of the two foregoing grounds, the jury are instructed that they have a right to take into consideration the evidence tending to show

that the place where the accident occurred was a public crossing and that it was frequented, and that it was known to the motorman in charge of the car to be frequented, by young children, as well as by older persons.

"It is a question for the jury whether the motorman should have commenced to stop the car sooner than he did, and in determining that question they should take into consideration the fact, if they find it to be a fact, that the plaintiff and other boys were in the habit, at the point in question, of standing on the track until the car was very near them and then jumping off.

"In determining the question of how far the car was from the platform when the boys waved their hands they must be governed by the evidence, and not by speculation."

Of course you are to determine this case from the evidence and not from what counsel have said to you in their arguments, unless you find those arguments to be legitimate conclusions drawn from the evidence. You are to be governed by the evi-
81 dence and the instructions which the court gives to you as the law. Of course if counsel can aid you in reaching a conclusion which you think is correct, according to your own judgment, it is proper and right for you to consider their argument; but if they have said anything, in their arguments which does not appeal to you as being fair inferences to be drawn from the facts, you have the control of that just as you have the control of the question as to the credibility of the testimony of the witnesses and the weight to be given to each piece of testimony, the inference that is to be drawn from each fact that is admitted in the case, the size of the shoe and the shape of the shoe, the inference you may draw from that as to what the size of this hole was and how the boy's foot was fastened there—all of that is for you. What counsel have said is merely to aid you in that respect and to guide your judgment to the theory that each counsel has with reference to the merits of their side of the case. The whole question remains for you to determine as to what are the true facts, what is the true solution to be drawn from the evidence and the admitted facts, and what are the correct inferences you should draw in order to see just what this case is.

I have said I would grant the latter part of this third instruction for the defendant, and I will read it:

"And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that
82 point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

The same idea is conveyed in the instruction I have granted on behalf of the plaintiff, and the comments I made upon it. The whole matter comes down to the one point as to whether or not this defendant was guilty of negligence, or whether that construction was reasonably safe, whether that motorman acted with reasonable

diligence under all the circumstances; or whether the construction was not safe and the motorman did not act with reasonable diligence under the circumstances. You must determine those questions by the light which these people had at the time this accident occurred. From all the light they had was this an omission of duty on the part of the defendant in the construction of the road, or was it an omission of duty on the part of the motorman in failing to stop that car sooner than he did?

In addition to these instructions there is another one I have granted with reference to damages. Of course if you find for the defendant that is the end of this case, and a general verdict will be taken for the defendant. If you find for the plaintiff you must go farther and ascertain what the damages should be and fix the amount in your verdict.

"The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury, and from the loss of his leg; for the inconvenience to
83 which he has been put, and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

You must exercise your own best judgment in regard to that. Of course you are limited by the declaration and cannot exceed the amount claimed, $25,000. Of course that is not a suggestion to you that you should take that as a criterion to go by. That is only a limit, above which you cannot go. It is not a suggestion that you should go to that amount. The question is simply: What is proper compensation to this boy for this injury, in case you find a verdict in his favor? What is proper compensation considering all the circumstances, the wound, the suffering, his probable length of life, the handicap he will sustain by reason of this wound during the remainder of his life—make an estimate as best you can on that subject.

In addition to these instructions counsel have asked, in order that they may get upon the record some ground for your verdict in this case and in order that they may know upon what ground it is based, three questions which they desire to have submitted to you, and which you will answer yes or no as you may determine when you go to your jury room.

The first is:

84 1st. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing?

If you find that the defendant was negligent you simply answer that question yes. If you find that it was not, you answer it no.

2nd. Was the defendant guilty of negligence in the improper management of the car?

If you find that the defendant was negligent you will answer that interrogatory yes, and if you find that it was not, you will answer it no.

The third is:

"Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank?"

That question you answer yes or no, according as you may find the fact.

Of course it is admitted by counsel and they will not undertake to escape from that admission, that as soon as the motorman saw the boy's foot was caught there, he did everything to stop the car that he could do. I have no doubt the motorman did that. Of course it is claimed by counsel for the defendant that that was the extent of its liability, but, as you understand already from the instructions I have given you, you have a broader field here in which you are to exercise your judgment on this question of negligence, which you may consider in answering this second question: Was the defendant guilty of negligence in the improper management of the car.

83 If you find that it was guilty of negligence in the improper management of the car you should answer that yes. Or you may answer that first interrogatory "no" and answer the third interrogatory "Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and the plank"—you may answer that yes; and still you may bring in a verdict for the plaintiff, in the event that you find that this motorman ought to have exercised greater diligence in getting the car under control or stopping that car before the car reached a close proximity to the boy and before he saw the foot was caught in the track. If you reach that conclusion you can still answer the second interrogatory in the affirmative and maintain it on that theory, provided you find that theory to be sustained by the evidence.

It is only for the purposes of specifying that these questions are submitted to you, so that they may know something about what the ground of your verdict is.

Mr. COLE: I want to call the attention of the court to a very plain proposition which I would like to have given to this jury about which there is no controversy, but which the jury may not have in mind unless it is stated to them, and that is that the burden here is upon the plaintiff to prove negligence in one or the other of these particulars by a preponderance of the evidence.

The COURT: Yes; that burden is upon the plaintiff, and in discharging that burden the jury are to consider all the evidence, that

for the plaintiff and for the defendant, as well, in answering the question whether the plaintiff has discharged the burden of proof.

86 And thereupon the counsel for the defendant renewed his exception to the rulings of the court upon instructions refused and granted, respectively.

And be it further remembered that each of the exceptions mentioned in the foregoing bill of exceptions to the several rulings of the court mentioned were separately and severally made and taken at the time said rulings were made and before the jury retired to consider of their verdict; that the judge who presided at the trial noted said several exceptions in his minutes at the time of the taking thereof; and that now at the request of counsel for the defendant, the same are separately and severally embodied in this bill of exceptions and the same is signed and sealed in this bill of exceptions and the same is signed and sealed and made a part of the record in this case this 1st day of August, 1904, now for then.

JOB BARNARD, *Justice.*

This bill of exceptions is agreed to as a correct statement of so much of the case as is involved in the exceptions relied upon by the defendant.

A. S. WORTHINGTON,
Of Counsel for Plaintiff.
C. C. COLE,
Of Counsel for Defendant.

July 5, 1904.

87 *Directions to Clerk as to Transcript.*

Filed August 5, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, vs. ALLEN L. McDERMOTT, Receiver of the City and Suburban Railroad Company of Washington, a Corporation.	At Law.	No. 45838.

To the clerk of said court:

Please copy the following as the record in this cause for use upon appeal to the Court of Appeals:

1. The original declaration;
2. Plea thereto;
3. Amendment to the declaration;

4. Plea thereto;
5. Bill of exceptions;
6. All orders of the court in said case;
7. Stipulation of counsel of the fifth day of May, 1904;
8. Stipulation of counsel of the 30th day of June, 1904;
9. This direction for the record.

C. C. COLE.
B. W. PARKER.

To A. S. Worthington and W. M. Lewin, Esquires, attorneys for the plaintiffs.

SIRS: You are hereby notified that we have designated the
88 above as the parts of the record in this cause to be copied for use in the Court of Appeals. If you should desire anything further not therein mentioned we will be glad to add it to our order.

C. C. COLE.
B. W. PARKER.

Received a copy of the foregoing this 1st. day of July, 1904.

A. S. WORTHINGTON,
Of Counsel for Pl'tff.

89 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } *88:*
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 88, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45838, at law, wherein Charles E. Severe, by his next friend, William B. Severe, is plaintiff, and Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of August, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1464. Allan L. McDermott, receiver, &c., appellant, *vs.* Charles E. Severe, by next friend. Court of Appeals, District of Columbia. Filed Aug. 29, 1904. Henry W. Hodges, clerk.

WEDNESDAY, *February 15th, A. D.* 1905.

ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
No. 1464.

The argument in the above entitled cause was commenced by Mr. C. C. Cole, attorney for the appellant.

THURSDAY, *February 16th, A. D.* 1905.

ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
No. 1464.

The argument in the above entitled cause was continued by Mr. C. C. Cole, attorney for the appellant, and by Mr. A. S. Worthington, attorney for the appellee, and was concluded by Mr. C. C. Cole, attorney for the appellant.

On motion, each side is allowed to file additional brief herein if so advised.

ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
No. 1464.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the court:)

This is an appeal from a judgment in an action for personal injuries.

Plaintiff, then a child of seven years, lived with his father near the line of the double track electric railway, between Riverdale and Washington, operated by defendant as receiver of the City and Suburban Railway Company.

Plaintiff's father and mother had gone on a short visit to Cape May and were expected to reach home, by way of the electric railway from Washington, on Sunday, August 31, 1902, about 2 o'clock in the afternoon. Erickson Severe, the plaintiff, had two brothers, Edward and Raymond, of the age of 9 and 5 years respectively.

About 1.30 o'clock the three boys went to the customary stopping place of the cars, when passengers desired to get on or off, which was indicated by signs upon poles erected near the tracks.

There was no street or public highway crossed by the railway at the point, but, under agreement with the donor of the right of way, the defendant had constructed and maintained a board crossing on both tracks, which in the evidence was spoken of as a platform. Persons often crossed on foot to reach the fields and waters on the other side. The evidence tended to show that the boys went there to meet their parents upon their expected arrival.

The eldest boy, Edward, testified that they stayed about an hour together waiting near the track, sitting for a time near a small power house situated near the railway. That he left his brothers standing on the platform and went to the house for a drink of water, intending to return and wait for his parents. On his return Raymond met him at the gate, saying Erickson's foot was caught at the track. That he ran down and saw his brother had his foot caught between the rail and the boards of the crossing; saw a car coming down the track at the same time from 50 to 60 feet away. That he was on the boards and waved his hat and called to the motorman to stop. That the car did not stop until after it struck his brother.

Plaintiff corroborated his brother's evidence in regard to their coming to the tracks, and his brother's return to the house for water. He said that after Edward left Raymond's foot got caught between the rail and board. That he did not notice what Raymond had been doing just before this. That he went to Raymond and loosed his foot, and just as he was going back his own foot caught as he was crossing over. Witness could not pull his foot out and Raymond went to tell Edward. Raymond and Edward met at the gate and came running back. His back was to the car when he heard it coming. He turned his head and saw it coming. He waved his hand. Edward was waving his hat up and down and calling to the motorman. Raymond was behind Edward and waving also. The car was close on him when he saw it first. He saw the motorman when he tried to stop, but he was struck and dragged two or three yards. His left foot was the one caught. Other evidence showed that the plaintiff's leg was badly mangled; that he was carried in the car to Washington, and that his leg was amputated at the hospital.

A passenger on the car testified that the car stopped with a sudden jolt, and that at the time two little boys were on the bank jumping up and down and hallooing. Another passenger testified for defendant that his attention was attracted by the repeated ringing of the bell, and looking out he saw a boy on one of the tracks waving his hand. Did not see the plaintiff. The next thing that occurred was a jolt as the car was brought to a stop. The motorman was putting on the brakes as hard as he could. Could not tell how far the car went from the first time that he saw the boy mentioned.

The motorman, testifying for defendant, said that he saw the boy

on the track about 300 or 400 feet away. That three boys were on the track running and jumping backwards and forwards across the tracks. That about 150 feet away he sounded his gong. That two of the boys got back on the bank and one stayed on the track. That he rang the gong repeatedly. That he was about 35 or 40 feet away when he saw that the boy was not going to get off the track. That he applied the brakes with all his power and reversed the power, stopping the car as quickly as he could. That when he stopped and got off he found the boy about the center of the car. That he had often seen the same boy and others standing on the track, and that as the car got almost to him he would jump off, clap his hands and laugh. That he did not see either of the two boys on the bank wave their hands. Plaintiff did not wave to him, and had his face towards him when struck. That he saw his foot was hung when he was about 30 or 35 feet from him. That the car was between 36 and 38 feet in length, and was running about 8 or 9 miles per hour. Another motorman testified that he had frequently observed boys, plaintiff among them, playing on the crossing and jumping off the tracks ahead of the cars. A witness living near by testified to the same effect. There was testimony tending to show that the boards of the crossing fitted closely to the outside rail. On the inside there was a space of from 2⅜ inches to 2 11-16 inches between the edge of the board and the tip of the rail, in which the flange of the wheel ran. The rail was the ordinary T rail. The board was square-edged, and under the top of the rail the space widened. The shoe which plaintiff wore at the time was produced and the heel showed that it had been caught in this space.

Defendant introduced several witnesses, among them the contractor who laid the crossing and others familiar with such construction, whose evidence tended to show that it was customary upon railways generally to leave a space of from 2⅛ to 2½ inches for the entry and play of the flange of the wheel on the inside of each rail. One of these, a general contractor for such work, said that on steam railways the width is usually from 2¼ to 2½ inches because the wheels have a little more tread; that the space is left because if a stone should get in the space the flange would press it down, preventing derailment. That the stone ballast will work out and leave the space deeper, and that work has to be kept up in repair, and sometimes the board must be taken up to fill the low place. If not attended to the road will work out of surface. That in all the crossings on defendant's road the spaces were made from 2 inches to 2⅛ inches in width. Another of these having testified that the usual space left on railways was from 2 to 2½ inches, said that the flange of the rail level was ⅞ of an inch thick and tapered to practically nothing. He further said that in the city streets a special guard and grooved rail is laid.

Plaintiff, in rebuttal, offered evidence tending to show that at two other crossings on the defendant's line the space left between the board and the rail was much narrower than the one in question,

there being just width enough for the wheel flange and no more. Also that there was no filling of earth or gravel between the board and rail at the time, and that the board was 2 inches thick, and that subsequently the defendant had filled it in, but the filling would wash out from time to time.

The plaintiff and his elder brother denied that they had been in the habit of playing on the tracks and jumping off as claimed by defendant's witnesses. The younger boy, Raymond, was offered as a witness, but the court pronounced him incompetent after examining him for the purpose.

The jury returned a verdict for the plaintiff for $15,000. The court also required them to return answers to the following special issues:

"1. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing?

"2. Was the defendant guilty of negligence in the improper management of the car?

"3. Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank?" They answered "Yes" to the first two of these and disagreed as to the third. "Thereupon," as recited in the record, "counsel for the plaintiff consent that the jury may answer said third interrogatory in the affirmative, but said jury was discharged from further considering said interrogatory."

It is conceded, by reason of the special findings of the jury, that the defendant was guilty of negligence, not only in the construction and maintenance of the crossing, but also in the management and control of the car; that error in the instructions upon both points must be shown in order to obtain a reversal of the judgment, because either finding alone is sufficient support therefor. On the first of these issues the court charged the jury as follows:

"The construction there is said to be faulty. Of course in determining the question whether or not it is faulty, you must consider all the testimony in the case, the construction that has been used, and the reason that is given for making the construction in the way it was made; and yet if you find that it was obviously dangerous, notwithstanding that testimony, this company should not be held free from blame for adopting it. That is one question upon which you should exercise your judgment, that is upon the question whether or not there was obvious danger in a construction like this, in the width of the hole, in the depth of the hole, in view of the place where it was located and the fact that children did go on this place, which was known to the officers and employees of the defendant, and whether or not they were in the habit of crossing at that point and playing upon that track. It is for you to determine whether or not, under all of these circumstances, it was a dangerous situation and should have been observed by the defendant."

The court also gave the following extract from the instruction asked by the defendant and refused as a whole: "And the jury

should determine the question whether the construction was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

The defendant asked the following special instruction, which was refused:

"If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

The instructions given left the question of negligent construction and maintenance fairly to the jury upon all of the evidence relating thereto, and there was no error in refusing defendant's special instruction based entirely upon the evidence relating to the general custom of railways in respect of the space usually provided between the inner edge of the rail and the edge of the crossing board. Evidence of the general custom of other railways in the matter of construction, maintenance, and operation is not always admissible even, and though probably proper, in this case, for the consideration of the jury in the determination of the question of negligence submitted to it, it is neither conclusive nor of specially great weight. Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454, 461; T. P. R. Co. *v.* Behrman, 189 U. S. 468, 470; G. T. R. Co. *v.* Richardson, 91 U. S. 454, 469; Weaver *v.* B. & O. R. Co., 3 App. D. C. 436, 448, and cases cited. See, also, Spooner *v.* D. L. & W. R. Co., 115 N. Y. 22; R. R. Co. *v.* Walter, 147 Ill. 60, 64; L. E. & W. R. Co. *v.* Mugg, 132 Ind. 168, 174; Hamilton *v.* R. R. Co., 36 Iowa, 33, 37; Koons *v.* St. L. & I. M. R. Co., 65 Mo. 592; Helfenstein *v.* Medart, 136 Mo. 595, 617; Mayhew *v.* Sullivan Mining Co., 76 Me. 100, 111; City of Champaign, 50 Ill. 61, 65.

The question as here presented is quite different from that in Asphalt Co. *v.* Mackey, 15 App. D. C. 410, 425, upon which the appellant relies. There, in an action for injury to an employee, the evidence showed that the appliance was one commonly in use and considered safe, that it was not out of repair, and that the injury was due to careless handling by a fellow servant, and it was held that it was not error to refuse an instruction permitting the jury to find that the defendant had been negligent because of its failure to

substitute for a reasonably safe appliance in general use another, and, in the opinion of the jury, a superior one.

Under an assignment of error on the refusal of the court to direct a verdict for the defendant, the contention of the appellant, on the argument, has been that the evidence of the general custom of construction of like crossings is conclusive proof of the exercise of reasonable care, but the refused instruction does not go that length.

As before said, the evidence in this regard was clearly not conclusive; nor was it of an exceptional character and weight that required the court to give it emphasis in charging the jury. It is to be remembered also that the customary space left to receive the flanges of the car wheels was proved to have been something less, even upon steam railways, than that at the place of the accident; that there was evidence tending to show that the flanges were not more than three-fourths of an inch wide at the surface of the rail, and narrowed sharply for the very short distance to their rims; that there was evidence tending to show considerably less space for the purpose at other of defendant's crossings; and that though no similar accident had been known to have occurred before on any of defendant's crossings, the foot of the plaintiff's younger brother had been caught in the same opening a few minutes before. Moreover, that no similar accident had ever before occurred within the knowledge of the defendant, a fact upon which stress is laid in the refused instruction, is of no weight in determining the question of negligent construction. Many well considered cases hold that such evidence is not even admissible. Hodges *v.* Bearse, 129 Ill. 87, 89; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 75; Bloor *v.* Town of Delafield, 69 Wis. 273, 277; Temperance Hall Assn. *v.* Giles, 33 N. J. L. 260, 263. The question of admissibility, however, it is not necessary here to decide. It may be added also that in one of the cases above cited the injury was caused by a like construction, and the question of negligence was held one proper for the determination of the jury. Spooner *v.* D. L. & W. R. Co., 115 N. Y. 22, 33.

On the second point the defendant requested the following special instruction, which was refused:

2. "If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant."

Several other instructions of like purport were asked and refused, but as they comprehend the first point also and contain the matter relating to the construction of the crossing that has been passed upon they will be omitted.

The court thereupon charged the jury as follows:

"On the other question, as to whether the motorman did all that he could possibly do under the circumstances to avert this danger you will have to consider all of the testimony, not only that of the plaintiff, but of the defendant, and try to reconcile it so far as you can in order to ascertain where the fact lies. Was it prudent in that motorman, under all the circumstances of the case, to calculate that these children would be off from that track and out of danger when he got there? Or was it requisite for him, as a prudent and reasonable man, to have his car under control, so that he could stop very suddenly in case they were not out of danger when he got there? Of course, in determining that question you are to consider what had been the habit of children about playing at that place. You are not to attribute any contributory negligence to the plaintiff, because this plaintiff is less than seven years of age and the law does not give him discretion. Adults have to look out for children of that kind. But at the same time he may have been in the habit of jumping off and on that track in such a way that the motorman might have been justified in concluding there would be no danger. You are to look at all the surrounding facts and see whether that is true, whether he was justified in that calculation. There was one boy still smaller than the boy who was injured, and according to the motorman's own statement the three boys were running back and forth across the track. It is for you to determine whether or not he should have gotten into close proximity to them without getting his car under such control that he could have stopped very suddenly if necessary to prevent an accident. Of course, after he saw that the boy's foot was caught he must do everything to stop the car. But I call your attention to the time before he could see that the boy's foot was caught and ask you to consider what it would have been prudent for him to do before that time, considering all the surrounding circumstances, considering the formation of this plank crossing, of this track and of this platform, and considering the fact, as the motorman says it was a fact, that the children were frequently there running back and forth. Should he have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught. Of course, after he saw that the boy's foot was caught it must be his duty to stop just us soon as he can in order to prevent the accident. I have no doubt he did that. But whether he discharged his whole duty towards these children, whom he admits having seen there before that time, is a question for the jury."

We are of the opinion that there was no error either in giving the one instruction or refusing the other. Under all of the facts and circumstances of the case it was proper to submit to the determination of the jury the question whether the motorman, who had ample time to do so after he first saw the children on or near the track, was not guilty of negligence in failing to get his car under such

control that he could have stopped it in time to avoid running over the plaintiff after he actually saw that his foot had been caught between the board and the rail. City Pass. R. Co. *v.* Cooney, 87 Md. 266, 288; Welsh *v.* Jackson, 81 Mo. 466; Levingston *v.* Wabash R. Co., 170 Mo. 452, 471; Holden *v.* Missouri, etc. R. Co., 77 S. W. Rep. 973 (Mo. 1903); Danville R. & E. Co. *v.* Hodnett, 101 Va. 361; Strutzel *v.* St. P. City R. R. Co., 47 Minn. 543, 545; Bray *v.* St. P. C. R. Co., 87 Minn. 280, 284; Forrestal *v.* M. E. R. & L. Co., 119 Wis. 495, 500; L. & N. R. R. Co. *v.* Van Arsdell (Ky. 1904), 77 S. W. Rep. 1103; Wallace *v.* City, etc. R. Co. (Oregon, 1894), 25 L. R. A. 663; and see Spooner *v.* D. L. & W. R. Co., 115 N. Y. 22, 33; O'Connor *v.* B. & L. R. Co., 135 Mass. 352, 356, 361.

The last question for consideration arises on an exception taken to the charge of the court instructing the jury in respect of the measure of damages, as follows:

"The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury and from the loss of his leg; for the inconvenience to which he has been put and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs.

"You must exercise your own best judgment in regard to that. Of course you are limited by the declaration and can not exceed the amount claimed, $25,000. Of course that is not a suggestion to you that you should take that as a criterion to go by. That is only a limit, above which you can not go. It is not a suggestion that you should go to that amount. The question is simply: What is proper compensation to this boy for this injury, in case you find a verdict in his favor? What is proper compensation considering all the circumstances, the wound, the suffering, his probable length of life, the handicap he will sustain by reason of this wound during the remainder of his life—make an estimate as best you can on that subject."

Defendant asked no special instruction on this point and pointed out no specific objection to the charge given, but excepted thereto in general terms. The following special objections have been urged on the argument: (1) That the jury were told that if they found for the plaintiff their verdict should not exceed the amount claimed in the declaration. (2) That there was no evidence from which the jury could compute the pecuniary damage of the plaintiff due to the deprivation of the use of his leg throughout life. (3) That damages for this deprivation until plaintiff shall attain the age of 21 years

accrue to his father and not to him. (4) That future mental suffering is not an element of damage.

As said before, the exception to the charge was general and not specific. And recurring to the assignment of errors we find but two of the objections now contended for pointed out therein. These are: (1) "The jury should not have been permitted to consider future mental suffering in enhancement of damages. (2) The jury should not have been permitted to consider future pecuniary loss to the plaintiff by being deprived of the use of his leg."

Under these limitations in the assignment of error the first and third objections before stated pass out of consideration. However, they are of no practical importance under the circumstances. The expression in the first part of the charge relating to mental suffering in the future was part of an instruction that was good in general, and the language is substantially similar to that of a charge on the measure of damages that has been held good by the Supreme Court of the United States under a general exception. W. & G. R. R. *v.* Harmon, 147 U. S. 571, 573, 584; see, also, D. C. *v.* Moulton, 15 App. D. C. 363, 367, 379: Whether future mental anguish forms an element of damages for the consideration of the jury, save under peculiar conditions which may or may not be found in the case before us, is a question that we need not consider in the absence of a special instruction, or specific exception directing the attention of the trial court thereto. The rule is well settled that where an objectionable element is contained in a charge that is correct in general, and is not stated as an independent proposition, a general exception to the entire charge is not sufficient. T. & P. Ry. Co. *v.* Humble, 181 U. S. 57, 67; T. & P. Ry. Co. *v.* Cody, 166 U. S. 606, 616; B. & P. R. R. *v.* Mackey, 157 U. S. 71, 91, 92, and cases cited; De Forest *v.* U. S., 11 App. D. C. 458, 464; Ryan *v.* R. R. Co., 8 App. D. C. 542, 543. This rule of practice is directly applicable to the conditions here presented. The charge given was apparently adopted from that approved in W. & G. R. Co. *v.* Harmon, *supra*, and it does not appear from the language used that the court contemplated future mental anguish as an independent element of plaintiff's damages. Had special attention been called to this language before submission to the jury the ambiguity might have been corrected.

Assuming that the second point raised in the error as assigned may be available under the general exception, we are of the opinion that it is not well taken. Damages of the kind are clearly recoverable in the case of an adult. In such a case it is within the power of the plaintiff to introduce evidence of the ordinary earning capacity of the party at the time, but still there remains a large element of uncertainty which must be left to the sound discretion of the jury. In the case of an infant of the age of the plaintiff there can be no like evidence, but it is nevertheless clear that a similar damage must occur. Rosencranz *v.* Lindell Ry. Co., 108 Mo. 9, 17; Scmitz *v.* St. L. I. M. & S. Ry. Co., 119 Mo. 256, 277; T. & P. Ry. Co. *v.* O'Donnell, 58 Tex. 27, 44. Evidence relating to the probable

earnings of the infant plaintiff after attaining an age when he might reasonably be expected to undertake regular occupation or employment would necessarily consist of conjecture on the part of the witnesses. There is no ground for the introduction of evidence in the nature of expert testimony, and the ascertainment must be left to the common experience of the jury charged with the responsibility of returning a fair verdict under all the circumstances—a verdict that is at the same time subject to the approval or disapproval of the trial court. Any other rule would deny to all infants the recovery of any damages whatever on account of the diminution of future earning capacity which must necessarily result from the loss of a limb, and would work not only hardship, but injustice also. The consequential uncertainty of the computation of such damages, as is the case in that permitted for pain and suffering, should be borne by the wrongdoer rather than by the victim of his wrongdoing.

Finding no reversible error in the proceedings on the trial, the judgment will be affirmed with costs. It is so ordered.

Affirmed.

TUESDAY, *April 4th, A. D.* 1905.

ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, William B. Severe.
} No. 1464, April Term, 1905.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

April 4, 1905.

FRIDAY, *April 7th, A. D.* 1905.

ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
} No. 1464.

On motion of Mr. J. J. Darlington, on behalf of counsel for the appellant, it is ordered by the court that a writ of error to remove

this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, appellant, and Charles E. Severe, by his next friend, William B. Severe, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of April, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
——.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Allan L. McDermott, receiver of the City and Suburban Railway of Washington, as principal, and George H. Harries, as surety, are held and firmly bound unto Charles E. Severe, in the full and just sum of three hundred and no 100 ($300.00) dollars to be paid to the said Charles E. Severe or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of April, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, plaintiff in error, and Charles E. Severe, by his next friend, William B. Severe, defendant in error a judgment was rendered against the said Allan L. McDermott, receiver of the City and Suburban Railway of Washington and the said Allan L. McDermott, receiver of the City and Suburban Railway of Washington having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said —— —— citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Allan L. McDermott, receiver of the City and Suburban Railway of Washington shall prosecute said writ of error to effect, and answer all costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALLAN L. McDERMOTT, [SEAL.]
Receiver of the City and Suburban Railway of Washington.
GEO. H. HARRIES. [SEAL.]

Sealed and delivered in the presence of—
JAS. B. LACKEY.
JAS. B. LACKEY.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

This bond is satisfactory.
A. S. WORTHINGTON,
Att'y for Def't in Error.

[Endorsed:] No. 1464 Allan L. McDermott, receiver &c. appellant *vs.* Charles E. Severe, by his next friend William B. Severe. Bond on writ of error to Supreme Court, U. S. Court of Appeals District of Columbia Filed Apr. 13, 1905 Henry W. Hodges clerk.

UNITED STATES OF AMERICA, *ss:*

To Charles E. Severe, by his next friend, William B. Severe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein

Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 13th day of April, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.

A. S. WORTHINGTON,
Att'y for Def't in Error.

April 17, 1905.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 13, 1905. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 58, inclusive, contain a correct transcript of the record and proceedings of said Court of Appeals in the case of Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, appellant, *vs.* Charles E. Severe, by his next friend, William B. Severe, No. 1464, April term, 1905, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of April, A. D. 1905.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,731. District of Columbia Court of Appeals. Term No. 631. Allan L. McDermott, receiver of the City and Suburban Railway of Washington, plaintiff in error, *vs.* Charles E. Severe, by his next friend, William B. Severe. Filed April 26th, 1905. File No. 19,731.